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No. _____

In The

Supreme Court of the United States

October Term, 1995

IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb1-4 (1993), as applied to the Bankruptcy Code, 11 U.S.C. § 548(a)(2), violate the Establishment Clause because it compels private creditors to subsidize their bankrupt debtors' churches and because it establishes a preference solely for religion?

2. By requiring the courts to determine whether governmental action "substantially" burdens a claimant's exercise of religion, does RFRA violate the Establishment Clause because it entangles the judiciary in determining the centrality of a particular belief or practice in a religion or the plausibility of a religious claim?

3. Has Congress exceeded its legitimate powers, and violated the principle of Separation of Powers, by enacting RFRA, a statute which displaces the Supreme Court's interpretation of the Free Exercise Clause?

4. RFRA provides that "Government shall not substantially burden a person's exercise of religion," unless the governmental action furthers a "compelling governmental interest" by the "least restrictive means." Assuming that RFRA is constitutional: (a) what is the meaning of a "substantial burden" in the context of the Bankruptcy Code; and, (b) does the Bankruptcy Code further a compelling governmental interest by the least restrictive means?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. On the appeal before the Eighth Circuit, the United States intervened on behalf of Appellee Julia A. Christians (Petitioner in this Court) by brief filed on April 22, 1994. On September 15, 1994, however, literally a few minutes prior to oral argument, the United States withdrew. By order dated October 14, 1994, the court of appeals, apparently considering the United States' withdrawal as an ex parte motion to withdraw, granted the motion. There is no parent or subsidiary company of any party to be listed.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated May 6, 1996, reversing the decisions of the district court and the bankruptcy court, is reported at 82 F.3d 1407 (8th Cir. 1996), and is reprinted in the Appendix, *infra*, at A1-A38. The decision of the court of appeals denying the suggestion for rehearing en banc (and petition for rehearing) is reported at 89 F.3d 494 (8th Cir. June 27, 1996) and is reprinted in the Appendix at A39-A42. The decision of the district court, dated April 14, 1993, affirming the judgment of the bankruptcy court, is reported at 152 B.R. 939 (D. Minn. 1993), and is reprinted in the Appendix at A43-A74. The decision of the bankruptcy court, dated December 17, 1992, granting summary judgment in favor of Petitioner, is reported at 148 B.R. 886 (Bankr. D. Minn. 1992), and is reprinted in the Appendix at A75-A99.

BASIS FOR JURISDICTION

The court of appeals entered its order on May 6, 1996. The order of the court of appeals denying the suggestion for rehearing en banc and the petition for rehearing was entered on June 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) have been made, and 28 U.S.C. § 2403(a) may apply. By Order dated February 9, 1994, following a request by the Appellant (Respondent in this Court), who had challenged the constitutionality of 11 U.S.C. § 548(a)(2), the court of appeals, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Establishment Clause, First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion ... .

The Bankruptcy and Necessary and Proper Clauses, Article I, § 8, United States Constitution

> The Congress shall have Power ...
>
> > To establish ... uniform Laws on the subject of Bankruptcies throughout the United States. ...
> >
> > To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ... .

The Due Process Clause, Fifth Amendment, United States Constitution

> ... nor shall any person ... be deprived of life, liberty or property, without due process of law ... .

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb1-4 (1993)

> The full text of The Religious Freedom Restoration Act ("RFRA") is reprinted in the Appendix (A100-A103).

The Bankruptcy Code of 1978, 11 U.S.C. §§ 548(a)(2) and 548(d)(2)(A)

> The full text of §§ 548(a)(2) and 548(d)(2)(A) is reprinted in the Appendix (A104-A105).

STATEMENT OF THE CASE

This case involves a bankruptcy trustee's efforts to recover, on behalf of creditors, $13,450.00 given by the insolvent debtors to their church prior to the debtors' filing for bankruptcy. By its decision in the case, a divided panel of the United States Court of Appeals for the Eighth Circuit has ruled that a federal statute interpreting the Free Exercise Clause requires the creditors to forego their right of repayment in order involuntarily to subsidize the religious practices of their debtors.

On February 3, 1992, Bruce Young and Nancy Young (the "Debtors") filed a joint petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Chapter 7 gives debtors a "fresh start" by discharging them from their debts while allowing them to keep certain "exempt" assets. At the same time, Chapter 7 protects the debtors' creditors by providing that the creditors will receive payment of the debtors' justly owed debts to the extent that the debts can be paid from the debtors' "non-exempt" assets and from property transferred by the debtors prior to bankruptcy in certain voidable transactions.

Petitioner Julia A. Christians ("Christians" or the "Trustee") was appointed the trustee of the Debtors' bankruptcy estate. As bankruptcy trustee, Christians' job was to collect the bankrupt Debtors' "non-exempt" assets and to recover the bankrupt Debtors' voidable transfers, and then to distribute the resulting monies to the creditors. The Debtors ultimately turned over to Christians only $1,500.00 in "non-exempt" assets toward payment of the Debtors' unsecured debts of more than $150,000.00, although the Debtors kept assets valued at more than $300,000.00 after receiving their discharge in bankruptcy.

Christians then attempted to recover the Debtors' recent pre-bankruptcy gifts to their church, pursuant to Bankruptcy Code § 548(a)(2). Section 548(a)(2), in conjunction with § 550, allows a trustee to recover property transferred by debtors within one year preceding the filing of their bankruptcy petition, if the debtors were insolvent at the time of the transfer and if the debtors received "less than a reasonably equivalent value in exchange" for

the transfer. Value, for these purposes, is defined as "property." 11 U.S.C. § 548(d)(2)(A).

During the year prior to their filing for bankruptcy, the Debtors had made monetary gifts to their church, Respondent Crystal Evangelical Free Church (the "Church"), totalling $13,450.00. It is undisputed that the Debtors were insolvent when they made the gifts. It is also undisputed that the Debtors made the gifts as part of a sincere religious belief. The Church maintains that the Debtors' gifts were a "tithe," which is a gift of one-tenth of the donors' income to their church. Apparently the Debtors computed their income for tithing purposes as gross receipts, without taking into account their expenses.

When the Church refused her request to turn over to her the $13,450.00 in pre-bankruptcy transfers, Christians commenced this adversary proceeding in the United States Bankruptcy Court for the District of Minnesota on May 13, 1992, alleging that the Debtors' gifts to the Church were voidable transfers under § 548(a)(2). In denying Christians' claim, the Church did not raise any constitutional defenses but instead defended solely on grounds that the Debtors' monetary gifts to the Church were made in exchange for a reasonably equivalent value within the meaning of § 548(a)(2). The bankruptcy court's jurisdiction was based on 28 U.S.C. §§ 1134 and 157(a) and Local Rule 201.

The parties filed cross-motions for summary judgment based upon stipulated facts. A copy of the stipulation is included in the Appendix hereto at A106-A108.

By Order dated December 17, 1992, the bankruptcy court, the Honorable Robert J. Kressel, granted Christians' motion for summary judgment and denied the Church's cross-motion. *Christians v. Crystal Evangelical Free Church*, 148 B.R. 886 (Bankr. D. Minn. 1992), reproduced in the Appendix at A75-A99.

On appeal to the district court, the Church reiterated its arguments concerning § 548(a)(2), and also raised for the first time the argument that § 548(a)(2) is unconstitutional under the Religion Clauses of the First Amendment. The district court, the Honorable Harry H. MacLaughlin, affirmed the bankruptcy court. *Christians v. Crystal Evangelical Free Church*, 152 B.R. 939 (D. Minn. 1993), reproduced in the Appendix at A43-A74.

Concerning the Church's Free Exercise argument, the district court held that § 548 was a neutral statute of general applicability that had no more than an incidental effect on religion. Hence, under the rule of *Employment Div. v. Smith*, 494 U.S. 872 (1990), § 548 did not violate the Free Exercise Clause. The district court further held that even if *Smith* were not the law, § 548 would satisfy the Free Exercise Clause because the Bankruptcy Code is designed to advance a compelling government interest.

Concerning the Church's Establishment Clause argument, the district court observed that "[t]he trustee asserts that an Establishment Clause claim would arise only if the Court accepted the church's arguments and granted special treatment under section 548." 152 B.R. at 955. The district court agreed with the bankruptcy court and Christians that "a ruling in favor of the church could lead to Establishment Clause problems." *Id.*

The Church then appealed to the United States Court of Appeals for the Eighth Circuit, asserting the same arguments raised in the appeal to the district court. After the appeal was fully briefed by both sides, however, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb1-4 (1993), reprinted in the Appendix at A100-A103. Issues relating to the validity and application of RFRA thereafter dominated this case.

In RFRA, Congress expressly found that "governments should not substantially burden religious exercise without compelling justification," and that this Court's decision in *Smith* "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion." Given Congress' expressed unhappiness with *Smith*, the stated purpose of RFRA was to "restore the compelling interest test [for Free Exercise claims] as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."

The operative section of RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "application of the burden to the person" is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."

In supplemental briefing and at oral argument, the Church and Christians debated whether RFRA compelled a reversal of the district court and the bankruptcy court. Both parties argued: (a) whether Christians' recovery from the Church (not the Debtors) of an amount equal to the Debtors' pre-bankruptcy monetary gifts to the Church constituted a "substantial burden" on the Debtors' (not the Church's) exercise of religion; (b) whether the interests of the creditors in recovering the debts owed to them were a compelling governmental interest; and, (c) whether in any event Christians' recovery of the money from the Church was the least restrictive means of furthering the governmental interest.

In addition, Christians argued that RFRA would violate the Establishment Clause if RFRA meant that creditors could be repaid when bankruptcy debtors give their money away for secular purposes, but could not be paid when bankruptcy debtors give their money away for religious purposes. Christians further argued that if the Church were successful in its RFRA claim, the Eighth Circuit would impermissibly be endorsing certain religions.

At oral argument, Judge McMillian questioned Congress' constitutional authority to enact RFRA. In post-hearing submissions, the Church argued that Congress had constitutional power to enact RFRA and that RFRA did not violate the principle of Separation of Powers. Christians argued that RFRA does violate Separation of Powers principles.

Oral argument was held on September 15, 1994. Minutes before oral argument, the United States, which had intervened on behalf of Christians on April 22, 1994, withdrew from the case. The court of appeals rendered its decision on May 6, 1996, reversing the order of the district court by a two-to-one decision. *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), reproduced in the Appendix at A1-A38.

The majority held, first, that the Debtors did not receive reasonably equivalent value in exchange for their monetary gifts to the Church. Accordingly, the majority held that the contributions were avoidable transfers and were recoverable by Christians under § 548(a)(2).

The majority then turned to the effect of RFRA on this case. The majority stated that "[t]he threshold inquiry under the RFRA

is whether the governmental action in question 'substantially burdens' a person's religious practice." Although quoting the rule in *Smith* that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," the majority held that "[f]or purposes of analysis, we can assume that the recovery of these contributions would substantially burden the debtors' free exercise of religion."

The majority then addressed the question of whether there is a compelling governmental interest in the Bankruptcy Code in general and § 548(a)(2) in particular because they allow debtors to get a fresh start while at the same time protect the interests of creditors. Observing that "[t]he bankruptcy cases decided under the RFRA are split," the majority held that "the interests advanced by the bankruptcy system are not compelling under the RFRA." The majority thus held that RFRA provides a defense against the order of the district court permitting the Trustee to avoid the Debtors' contributions to the Church under § 548(a)(2).

In dissent, Judge Bogue reasoned that Christians' recovery of money from the Church (not from the Debtors) could not have "substantially burdened" the Debtors' exercise of religion, because the Debtors had already completed their religious act of donating money to the Church. The dissent further agreed with those courts that have held that the Bankruptcy Code and § 548(a)(2) further a compelling governmental interest in protecting the legitimate interests of creditors and do so in the least restrictive means.

Christians timely petitioned the court of appeals for rehearing, and also sought rehearing en banc. Christians' petition was denied by order dated June 27, 1996. *See* Appendix at A39-A42.

Christians now asks this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

By its decision, the court of appeals compels individuals to give involuntary financial support directly to another person's religion. This is so because under the court's ruling, a bankrupt debtor's creditors must forego their right to repayment of justly owed debts if the debtor has given money to a church in the exercise of the debtor's religion, with the result that the church may keep the money that would otherwise go to the creditors. At the same time, the court of appeals has established a favored class of "religious" donees who, unlike secular donees, are exempted from returning to the bankruptcy trustee, for repayment to an insolvent donor's creditors, the insolvent donor's pre-bankruptcy gifts.

The court's holding that, through RFRA, Congress has now compelled involuntary private subsidization of churches -- and concomitantly that Congress has granted a special privilege to "religious" donees to be free from generally applicable laws -- raises Establishment Clause issues of exceptional public importance. As Thomas Jefferson wrote, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 235-36 n. 31 (1977) (citing I. Brant, James Madison: The Nationalist 354 (1948)).

Moreover, in judging under RFRA the Debtors' claim of a right to free exercise of religion, the decision necessarily displaces this Court's rule of decision for free exercise claims set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990). Even the counsel for a coalition of *amici* religious organizations supporting the Church concedes that the Debtors' argument in this case would have been "quite a bit more difficult" had the court of appeals followed this Court's rule in *Smith* rather than Congress' rule in RFRA. *See* Michael Stokes Paulson, *A RFRA Runs Through It: Religious Freedom And The U.S. Code*, 56 Mont. L. Rev. 249,

259 (1995). By using the Congressional standards set forth in RFRA for judicial review of the bankrupt debtors' claim to religious freedom, rather than following this Court's dispositively different standards for judicial review of claims to religious freedom under the Free Exercise Clause, the court of appeals *sub silentio* holds that Congress may define the protection afforded by the Free Exercise Clause and may impose a standard for the judicial evaluation of all free exercise claims which overrules this Court's prior free exercise decisions. Thus, the court of appeals cedes to Congress the judiciary's role of defining the protection afforded to free exercise claimants. By doing so, the court of appeals raises issues concerning the separation of powers that are, again, of grave constitutional dimension and exceptional public importance.

Never has this Court allowed the impressment of one person for the purpose of subsidizing another person's religious beliefs. Nor has this Court ever permitted Congress to render this Court's own interpretation of the Free Exercise Clause nugatory. The decision of the court of appeals, wrongly and in violation of this Court's most fundamental teachings, endorses legislative establishment of religion and legislative supremacy over the judiciary in the interpretation of the Free Exercise Clause.

The decision of the court of appeals also threatens the integrity of the Bankruptcy Code. Under the rule created by the appellate court's interpretation of RFRA, bankrupt debtors may for all practical purposes deprive their creditors of any repayment of justly owed debts simply by giving their money away as part of a claimed exercise of religion. Because the court of appeals held as a matter of law that a debtor's religiously motivated gifts of money must be assumed to be central to the debtor's religious belief, the gifts do not even have to be made to a church; they could, for example, be made to the debtors' parents as part of a claimed exercise of religion ("Honor thy father and thy mother").

The bankruptcy trustee's only defense to such claims of religiously motivated giving is to challenge the sincerity of the donor's religious belief. Proving religious insincerity is notoriously difficult, however, in part because of the constitutional circumscriptions on permissible evidence regarding the closely

related issue of the validity of a claimed religious belief. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 954-57 (1989); *United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) ("I do not see how we can separate an issue as to what is believed from considerations as to what is believable"); *see also, e.g., The Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703 (Mich. App. 1996) (where church contended in RFRA case that its actions were religiously motivated, court held, "We are not at liberty to question this position.").

This peril to the rights of creditors under the bankruptcy laws is more than theoretical. Upon issuance of the decision by the court of appeals in this case, the attorney for one of the *amici* religious organizations announced to a newspaper, "There are a host of cases that are going to turn on this case today." *See* Lisa Lednicer, *Church Allowed To Keep Gifts Of Bankrupt Couple*, St. Paul Pioneer Press, May 7, 1996, 1A, 5A.[1]

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[1]As Judge Beam points out in his special concurrence in the denial of the petition for rehearing en banc, there can be occasions where a debtor transfers money to a church in exchange for a quantifiable, reasonably equivalent quid pro quo. In these few situations, Bankruptcy Code § 548(a)(2) obviously is not implicated. But Judge Beam also suggests that bankruptcy debtors could give their money to a church and avoid recovery of the money under § 548(a)(2) without implicating RFRA simply by alleging that they received "value" in the form of maintaining the church, and that this "value" was both "in exchange for" and "reasonably equivalent" to their gift. Judge Beam's suggestion, if it were the law, would quickly destroy the Bankruptcy Code. Under Judge Beam's proposed interpretation, every enterprising bankruptcy debtor, regardless of religious motivation, would give his money to a trusted friend and allege that the debtor received "value" from helping to maintain the friend's house (where, as in a church, the debtor, albeit without an enforceable promise to receive it, might nevertheless hope to find solace in the future), and that this "value" was both "in exchange for" and "reasonably equivalent" to the gift. Because the Bankruptcy Code defines "value" as "property," the Code does not permit such circumventions of its purposes. *See United States v. Locke*, 471 U.S. 84, 96 (1985) ("[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question") (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)); *compare*

A. The Eighth Circuit's Decision Upholding RFRA Conflicts With This Court's Establishment Clause Doctrine.

The holding of the Eighth Circuit that Congress may compel one person to subsidize another person's religious beliefs runs directly contrary to the neutrality that the Establishment Clause demands from Congress in matters respecting religion. The Eighth Circuit's holding conflicts irreconcilably both with the long-standing rule of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and with this Court's most recent Establishment Clause jurisprudence.

Pursuant to *Lemon v. Kurtzman*, a statute such as RFRA does not violate the Establishment Clause if it: (1) has a secular purpose; (2) does not have the primary or principal effect of advancing religion; and (3) does not foster an excessive entanglement with religion. *Lemon*, 430 U.S. at 612-13. A statute is unconstitutional if it fails any one or more of the three parts of the *Lemon* test. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). RFRA fails all three parts.

It cannot seriously be contended that RFRA has a secular purpose. As set forth in the Congressional findings and declaration of purposes, RFRA is overtly intended to heighten the protection afforded to religious exercise beyond the protection afforded by the Supreme Court's reading of the Free Exercise Clause in *Employment Div. v. Smith*, 494 U.S. 872 (1990). The Congressional findings ("governments should not substantially burden religion without compelling justification") and declaration of purposes ("to provide a claim or defense to persons whose religious exercise is substantially burdened by government") are a pure endorsement of the exercise of religion. *See* 42 U.S.C. § 2000bb (a) and (b).

Likewise, RFRA plainly has the primary or principal effect of advancing religion because it protects a "person's exercise of

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NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (where a statute would require a comprehensive regulatory presence that causes a significant risk of entanglement, the statute will be interpreted so as to avoid Constitutional questions).

religion" and protects nothing else except religious exercise. *See* 42 U.S.C. § 2000bb-1. Under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987), a law has forbidden "effects" if it connotes "sponsorship" or "financial support" of religion. RFRA has precisely such forbidden effects. In the present case, for example, RFRA provides financial support and sponsorship to religion by providing that churches and other recipients of religiously motivated gifts may keep money that is given to them by bankrupt debtors, but donees of secular gifts may not.

RFRA, as applied in the present case, compels creditors to forego repayment of debt so that their debtors' religious practices may receive financial support. Thus RFRA squarely violates Jefferson's admonition against "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves." *Abood*, 431 U.S. at 235-36 n. 31.

Finally, RFRA unquestionably fosters an excessive entanglement with religion. By providing that "[g]overnment shall not substantially burden a person's exercise of religion," RFRA requires that the courts first must determine what is, and is not, a substantial burden upon a person's exercise of religion. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Widmar v. Vincent*, 454 U.S. 263, 269-70, n.6 (1981) ("Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."); *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting in part) (RFRA impermissibly requires courts to "weigh the extent of an alleged infringement upon a religious practice against the importance of that practice"); *Smith v. Fair Employment and Housing Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring) (RFRA is unconstitutional because it requires courts to inquire into the substantiality of an alleged burden on religious exercise).

In *Amos*, this Court held that § 702 of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-1, which exempts religious institutions from Congress' prohibition of religious discrimination in

employment, did not impermissibly entangle church and state. Rather, by protecting religious institutions from governmental scrutiny for religious discrimination, § 702 "effectuates a more complete separation of the two and avoids ... intrusive [judicial] inquiry into religious belief ... ." *Amos*, 483 U.S. at 339. By dispositive contrast, RFRA openly requires judicial entanglement in religious issues. In the present case, RFRA requires that the courts evaluate the merits of the Church's claim that the Debtors' exercise of religion was in fact "burdened" by Christians' recovery of the tithe from the Church (not from the Debtors), and that this burden was "substantial."

This Court's most recent Establishment Clause cases confirm the result compelled by *Lemon*. In *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510 (1995), the Court echoed the *Lemon* test in holding:

> If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation.

Id. at 2521.

This Court emphasized in *Rosenberger* that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* RFRA plainly is not neutral towards religion; it blatantly favors religion. It extends no benefits or protection to anything except religion.

Unlike the constitutionally acceptable government program in *Rosenberger*, RFRA was "created to advance religion," *id.*, by establishing protection for religion beyond the level of constitutional protection delineated in *Smith*. And unlike the program in *Rosenberger*, RFRA grants financial benefits only to religion. Under the panel's decision in the present case, for example, RFRA protects those who give their money away prior to bankruptcy only if the gift is part of their "exercise of religion." By contrast, RFRA does nothing to protect secular gifts of money under otherwise identical circumstances. Thus RFRA protects a

sectarian gift to the Church, but not an otherwise identical secular gift to the Red Cross.

Further, under the appellate court's decision in the present case, RFRA requires creditors to forego repayment of debt to which they would otherwise be entitled, and thereby levies upon creditors a financial penalty for the direct support of religion, in direct relation to the amount of money the debtor has given away prior to bankruptcy as part of the debtor's "exercise of religion." *Rosenberger* makes clear that such financial favoritism for religion violates the Establishment Clause. *See id.* at 2522.[2]

In *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court "held that the display of a privately-sponsored creche on the 'Grand Staircase' of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not ... open to all on an equal basis, so the County was favoring sectarian religious expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2448 (1995). Like the "Grand Staircase," the benefits of RFRA are not open to all on an equal basis. RFRA is open only to those who practice religion. RFRA is "government action [that] ... discriminate[s] in favor of private religious expression or

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[2]As applied in the present case, RFRA not only favors religious giving over non-religious giving, but favors certain religions over other religions. Under the holding of the present case, religions that involve monetary giving as part of an adherent's "exercise of religion" are preferred over religions that do not involve such a requirement. Also, as applied in the present case, RFRA requires that non-adherents forgive debts so that adherents may, *pro tanto*, fund their churches. Certainly it goes beyond "accommodation" for RFRA in the present case to put money into the coffers of certain churches only, while denying others the right to such benefits. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (finding no secular objective for a sales tax exemption because the exemption applied only to religious organizations); *Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring that a statute was unconstitutional because it "single[d] out Sabbath observers for special and ... absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487-92 (1994) (holding that a statute creating a school district comprised entirely of members of the Satmar Hasidic sect violated the Establishment Clause).

activity." *Id.* (citing *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994)). RFRA therefore violates the Establishment Clause.

The courts have addressed RFRA's constitutionality under the Establishment Clause, with conflicting results.[3] Likewise, scholarly writing on both sides of the issue is well-developed.[4] RFRA's legislative compulsion of some individuals to subsidize financially the religious practices of another class of individuals runs directly contrary to this Court's Establishment Clause jurisprudence and threatens the religious freedom of all. The issue is ready for decision by this Court, and the present case offers a set of facts that places the issue in clear relief.

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[3]*Compare Lawson v. Singletary*, 85 F.3d 502, 505 n. 2 (11th Cir. 1996) (strongly suggesting, but not deciding, that RFRA violates the Establishment Clause); *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting in part) (RFRA is unconstitutional because it entangles the courts in determining the substantiality of an alleged burden on free exercise); *Smith v. Fair Employment and Housing Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring) (same); *with Sasnett v. Sullivan*, 1996 WL 432348 (7th Cir. 1996) *4 (RFRA does not violate the Establishment Clause); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne, Tex.*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same).

[4]*Compare, e.g.*, Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994) (arguing that RFRA violates the Establishment Clause); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (same); *with* William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 Mont. L. Rev. 227 (1995) (discussing whether RFRA violates Establishment Clause); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1098-99 (1993) (arguing that RFRA does not violate the Establishment Clause).

B. The Eighth Circuit's Decision Upholding RFRA Conflicts With This Court's Separation Of Powers Doctrine.

In 1990, this Court set forth the rule that laws that burden a person's exercise of religion nevertheless do not violate the Free Exercise Clause if the laws are neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). Religious groups, civil libertarians, academics, and Congress immediately criticized *Smith* as expressing an unacceptably weak definition of the Free Exercise Clause's protection of religion. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L. J. 65, 66-67 (1996).

Congress swiftly reacted to *Smith* by enacting RFRA. *Id.* In its findings and declaration of purposes, Congress makes clear that RFRA was intended to displace this Court's *Smith* decision and to "restore," and "guarantee its application in all cases where free exercise of religion is substantially burdened," an interpretation of the Free Exercise Clause perceived to give greater protection to religion; namely, the "compelling state interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb.

In setting a higher standard of protection for Free Exercise claimants than that set by this Court, RFRA necessarily displaces this Court's interpretation of the Free Exercise Clause. Under RFRA, if a challenged statute does not meet the high standard of Free Exercise protection defined by RFRA, the Free Exercise claimant is not subject to the statute, regardless of whether the statute is constitutional under this Court's less restrictive interpretation of the Free Exercise Clause as set forth in *Smith*. Conversely, if the challenged statute does meet RFRA's test, it automatically more-than-meets this Court's interpretation of the Free Exercise Clause. In short, RFRA makes Congress the supreme interpreter of the Free Exercise Clause, and renders this Court's interpretation irrelevant. *See, e.g., Estep v. Dent*, 914 F. Supp. 1462, 1466 (W.D. Ky. 1996) ("RFRA ensures that all claims of free exercise of religion are governed by the compelling interest standard rather than the lower reasonableness standard.").

Congress, however, does not have the power to impose its interpretation of the Free Exercise Clause upon the nation, no matter how urgent Congress believes the need to reverse this Court's rule in *Smith*. "The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

The power to interpret the Free Exercise Clause is the power of this Court, not of Congress. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("This [*Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

"It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, No. 94-1966, 1996 WL 287732, at *6 (U.S. June 3, 1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)). In RFRA, however, Congress intrudes upon this Court's province and duty to interpret the Free Exercise Clause. It does so by rendering this Court's interpretation of the Clause an irrelevant appendage and by imposing upon all courts, including this Court, Congress' view of the proper interpretation of the Free Exercise Clause. As stated by one of RFRA's authors, and the Church's counsel in this case, RFRA was "designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted". Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 254 (1994). RFRA therefore usurps this Court's authority to interpret the Constitution, and violates the principle of Separation of Powers.

Nothing in the Constitution grants Congress the power to legislate the standard of protection for Free Exercise claimants. The First Amendment does not contain any grant of power to Congress to enforce its provisions. Nor does the enforcement power under Section 5 of the Fourteenth Amendment, which some have argued gives Congress power to legislate a definition of religious liberty governing state and local law, have any application to federal laws such as the Bankruptcy Code. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 372-78 (1994).

RFRA's proponents argue that, for application to federal laws, RFRA finds its constitutional underpinning in the constitutional authority for the very federal laws to which RFRA would apply. In other words, "RFRA calls on us to assume that it effectively, and without any legislative discussion, amends every statute in the United States Code. ... The constitutionality of RFRA, in the federal sector, is thus supported by this argument: If Congress has the necessary and proper power to enact a bankruptcy or a banking law, then it necessarily has the necessary and proper power to tack onto that law the judicial balancing approach of RFRA." Gressman & Carmella, *supra*, at 137.

If RFRA is deemed an exercise of the enumerated Congressional powers under Article I, § 8, of the Constitution, however, then Congress had authority to enact RFRA only if RFRA passes muster under the Necessary and Proper Clause. *See* Const., Art. I, § 8, Cl. 18 ("The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As Chief Justice Marshall held in *McCulloch*, the standard governing whether legislation is "necessary and proper" is a three-part test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 321.

The "end" or purpose of RFRA is undeniably a sweeping redefinition of an individual's rights of Free Exercise under the First Amendment. This is not a legitimate Article I purpose. As stated by Professors Gressman and Carmella:

> [I]t is impossible to find legitimacy in RFRA's overweening "end" or "purpose," openly proclaimed in Section 2(b)(2), "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened." Add the repeated statements of RFRA's framers and sponsors that the real purpose of the Act is to overturn the Supreme Court's decisions in *Smith* and *O'Lone*, and we are forced to conclude that Congress simply cannot act with such "ends" in mind. **It is the height of illegitimacy for Congress to seek to control the judicial standards used in treating free exercise cases and controversies, to mandate or correct a judicial interpretation of the Free Exercise Clause, or to induce the judiciary to ignore if not overrule Supreme Court decisions. There is no provision in the Constitution that empowers Congress to legislate such "ends."**

Gressman & Carmella, *supra*, at 133-34 (emphasis supplied).

RFRA also fails the *McCulloch* test because it is not consistent "with the letter and spirit of the constitution." *McCulloch*, *supra*. RFRA is, in the words of one of its main proponents, "a replacement for the Free Exercise Clause." Laycock and Thomas, *supra*, at 219. Yet Congress did not follow the procedure required by Article V of the Constitution for replacing or amending the Free Exercise Clause. Instead, Congress invaded the exclusive province of the judicial branch to say what the law is. RFRA is therefore unconstitutional. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

As shown by the Congressional findings, 42 U.S.C. § 2000bb(a), Congress in enacting RFRA was not acting as "a political organ well-suited to conduct the business of empirical research and policy implementation" for the bankruptcy laws and the other Article I concerns allocated by the Constitution to Congress. *Hamilton v. Schriro*, 74 F.3d 1545, 1566 (8th Cir.

1996) (McMillian, J., dissenting in part). Instead, the language of the Congressional findings

> portrays Congress ... as a super-Supreme Court. ... In essence, [through RFRA] Congress has instructed the Supreme Court how to interpret the Free Exercise Clause of the First Amendment (that is, apply the compelling interest test), even though the Court, the entity charged by the Constitution with its application, has determined that the compelling interest test is neither feasible nor required. It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of the separation of powers. ...
>
> Were we to uphold RFRA ..., we would, under our reading of *Smith*, allow Congress to impose a standard for the judicial evaluation of all free exercise claims which not only overrules prior free exercise decisions but also, in the considered and paramount judgment of the Supreme Court, leads to constitutionally anomalous results. Where, as here, Congress acts ... to impose on the judiciary a method of analysis for the resolution of all claims based on the fundamental right of free exercise, which in the Court's view, does not produce "equality of treatment" but constitutional anomalies, such legislative action, I think, must be beyond the language and ... intent [of the Constitution].

Id. at 1566, 68 (McMillian, J., dissenting in part). As a violation of the principle of Separation of Powers, RFRA cannot be considered a "necessary and proper" application of Congress' Article I, § 8 bankruptcy power. Accordingly, Congress lacked the constitutional power to enact RFRA.

Numerous courts have now ruled on the issue of whether RFRA exceeds Congress' enumerated powers and violates the principle of

Separation of Powers.[5] Scholars have exhaustively debated the issue.[6] The issue is absolutely vital to the checks and balances

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[5]*Compare Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1421 n. 1 (Bogue, S.D.J., dissenting) (RFRA violates Separation of Powers); *Hamilton v. Schriro*, 74 F.3d 1545, 1561 (8th Cir. 1996) (McMillian, J., dissenting in part) (same); *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 291 (D. Md. 1996) (same); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 201 (Mich. App. 1995) (Murphy, P.J., concurring) ("Although the constitutionality of the RFRA is not before us today, I question Congress' authority to legislate the standard of judicial review applicable to a free exercise of religion claim"); *with Sasnett v. Sullivan*, 1996 WL 432348 (7th Cir. 1996) *4 (RFRA does not violate Separation of Powers); *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996) (same); *Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir. 1996) (same), *reversing* 877 F. Supp. 355 (W.D. Tex. 1995) (RFRA is unconstitutional violation of Separation of Powers); *Abordo v. State of Hawaii*, 902 F. Supp. 1220 (D. Haw. 1995) (RFRA is constitutional); *Belgard v. State of Hawaii*, 883 F. Supp. 510 (D. Haw. 1995) (same); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994) (same); *Gallo v. Salesian Soc., Inc.*, 676 A.2d 580, 593 n. 3 (N.J. Super. A.D. 1996) (same); *State v. Miller*, 538 N.W.2d 573, 577 (Wis. App. 1995) (same). Many courts have questioned but not decided the constitutionality of RFRA. *See e.g., Allah v. Beyer*, 1994 WL 549614 (D.N.J. 1994) *4 n.1. Countless federal and state appellate courts have applied RFRA, without discussing its constitutionality. Under the reasoning of *Reese v. Coughlin*, 1996 WL 374166 (S.D.N.Y. 1996) *5 n. 14, any court's application of RFRA indicates that the court implicitly finds RFRA constitutional.

[6]*See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995) (arguing RFRA is unconstitutional because it violates the separation of powers doctrine); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) (arguing RFRA is unconstitutional because it violates the doctrine of incorporation and is inconsistent with the framers' intent that the first amendment be a disability applicable to Congress); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) (discussing how RFRA circumvents the process of constitutional amendment and exceeds congressional power by infringing upon the reserved power of the states); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (arguing

that safeguard our form of government and is ready for decision by this Court.

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that RFRA violates principles of federalism and the Establishment Clause); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 131 (1996) (arguing that RFRA violates separation of powers doctrine); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (1994) (arguing that RFRA is unconstitutional as a violation of the doctrine of enumerated powers); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994) (arguing that RFRA is unconstitutional because it violates the Establishment Clause and that Congress exceeded its Section 5 powers); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171 (1995) (arguing for a narrow construction of RFRA to save it from invalidation on federalism grounds); *but see* Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73 (supporting RFRA as clarification of free exercise jurisprudence, and claiming broad Section 5 legislative power); Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181 (1992) (urging that Congress overturn *Employment Div. v. Smith* under its Section 5 power); Douglas Laycock & Oliver S. Thomas, *Interpreting The Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (arguing RFRA is constitutional and discussing how courts should enforce RFRA consistent with its vision of religious freedom accommodation); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994) (exploring RFRA interpretive issues and encouraging a standard affording broad protection for religious freedom); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996) (arguing that RFRA poses federalism issues but is constitutional as a legislative exercise of Section 5 power); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029 (1993) (suggesting RFRA is well within Congress's Section 5 power).

C. The Eighth Circuit's Decision Raises Important Questions That This Court Must Decide Concerning The Meaning Of A "Substantial Burden" On A Person's Exercise Of Religion For Purposes Of RFRA And The Bankruptcy Code, And Concerning The Importance Of The Values Protected By The Bankruptcy Code.

The present case underscores this Court's determination in *Smith* that the compelling interest test is not workable in cases involving the exercise of religion. RFRA requires evaluation, in the present case, of the merits of the Church's claim that the Debtors' exercise of religion was in fact "burdened" by the Trustee's recovery from the Church (not from the Debtors) of an amount equivalent to the Debtors' earlier tithes, and that this burden was "substantial." The majority of the appellate panel in the present case refused to undertake this evaluation, questioning whether "courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance." *Christians*, 82 F.3d at 1418. Instead, the majority chose simply to "assume" that the recovery from the Church (not from the Debtors) of an amount equivalent to the tithes "substantially burdened" the Debtors who had given the tithes months before. For the reasons suggested by this Court in *Smith*, it is understandable that the majority in the present case did not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. But RFRA statutorily requires such presumption from the courts. 42 U.S.C. § 2000bb-1(a). Thus RFRA requires an inquiry that this Court has held improper for courts to undertake, and that the panel in the present case refused to undertake.

Here, by refusing to undertake the factual inquiry necessary to determine "substantial burden" (indeed, the record in the case, as opposed to the lawyers' argument, contains nothing to support a "substantial burden") the majority held by default that religious practitioners who have fully completed their practice of tithing, and whose tithe is later taken away, not from the religious practitioners

but from the recipient of the tithe, are thereby themselves not only "burdened," but "substantially" so, in their religious activity. According to the majority, a "retroactive" impact on only the beneficiary of a religious activity must be "assumed" to be a "substantial burden" to the practitioners who completed the religious activity months earlier, perhaps because the ultimate wished-for goal of the tithe was not achieved. This is tantamount to holding that under the First Amendment the government must not only permit people to pray, but must also ensure that their prayers are answered.

Plainly, it cannot substantially burden the Debtors' exercise of religion for a bankruptcy trustee to recover from the Church an amount equivalent to the Debtors' earlier monetary gifts to the Church.[7] Thus if RFRA is constitutional, this Court should overrule the court of appeals and give necessary guidance on the threshold statutory issue of "substantial burden."[8]

Likewise, if RFRA is constitutional, this Court's guidance is needed concerning RFRA's command that courts determine which governmental interests are to be deemed "compelling." RFRA gives no guidance in this regard, except to reference unnamed "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). Yet one of the authors of RFRA maintains that "[t]he Supreme Court has been very inconsistent on what it means by compelling state interest." Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 901 (1994);

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[7]*See In re Newman*, 183 B.R. 239 (Bankr. D. Kan. 1995) (because the debtor has already completed his tithe when the bankruptcy trustee later recovers the equivalent amount of money from the church, § 548(a)(2) does not substantially burden the debtor's exercise of religion). *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), cited by the majority in the appellate court's opinion, is fundamentally distinguishable because *Tessier*, being a Chapter 13 case, held – prior to holding RFRA unconstitutional – that it would substantially burden a debtor's religious exercise if he were prohibited by his Chapter 13 plan from tithing in the future.

[8]The United States Courts of Appeal are split on the meaning of "substantial burden" in the context of RFRA. *See Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996).

see also Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994) (Thomas, J., dissenting from denial of petition for writ of certiorari). Thus RFRA leads to the possibility of arbitrary determinations of what is a compelling state interest. The Eighth Circuit, for example, has now held that there is not any compelling state interest in the Bankruptcy Code's careful balance of the rights of debtors and creditors authorized expressly by Article I, § 8, of the Constitution, but that there is a compelling state interest in the hair length of prisoners. *Compare Christians*, 82 F.3d. at 1419-20, *with Hamilton*, 74 F.3d at 1554-55. At least one other court has held that the Bankruptcy Code provision at issue in the present case **does** serve a compelling state interest. *See In re Newman*, 183 B.R. 239, 251-52 (Bankr. D. Kan. 1995); *cf. In re Turner*, 193 B.R. 548, 555-56 (Bankr. N.D. Cal. 1996) (compelling state interest exists for Bankruptcy Code requirement that petition preparers subscribe their Social Security numbers on documents). If RFRA is constitutional, therefore, this Court's guidance is sorely needed on the meaning of "compelling interest."

II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The majority, despite the record below, did not consider the constitutionality of RFRA. Instead, both the majority and the dissent incorrectly stated that the constitutionality of RFRA was not before them. *Christians*, 82 F.3d at 1417; *see also id.* at 1421 n. 1 (Bogue, S.D.J., dissenting). This failure to consider the constitutionality of RFRA is an alarming denial of procedural Due Process that requires this Court's attention.

Christians repeatedly argued to the Eighth Circuit that RFRA would be unconstitutional if it meant that creditors could be compelled to forego debt repayment in order to support their debtors' religious practices. In her first opportunity to address the issue, in her memorandum concerning RFRA, Christians expressly asserted that if the Church were to prevail, the Eighth Circuit

would unconstitutionally be endorsing certain religious practices.

At oral argument Christians again contended:

> Your Honor, I believe that if this Court were to apply RFRA here to say that "the Bankruptcy Court, or the Bankruptcy Trustee, rather, could not reclaim this money when it's given to a church, whereas the Trustee could if the money were given to any secular institution," then RFRA would be unconstitutional because RFRA would be establishing a preference for religions here.

At a later point in the argument, Christians stated:

> Your Honor, all I know is that if this statute RFRA were to apply here, religions would be favored over secular institutions and that that would be improper under the Establishment Clause.

Christians expanded upon these constitutional themes during oral argument.

Moreover, in post-hearing submissions, first the Church and then Christians presented argument concerning whether or not RFRA violated Separation of Powers principles. Thus, all the constitutional issues were debated in the court of appeals.

Christians was entitled to have her arguments considered because those arguments were in fact before the court of appeals. "Procedural due process rules are meant to protect persons ... from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The court of appeals cannot be allowed, by means of its mistaken statement that the parties did not raise the issues, to avoid addressing those issues. This Court must not permit parties to be deprived of their constitutional rights by means of an appellate court's incorrect pronouncement that the constitutional issues were not argued.

The Eighth Circuit's refusal to address the constitutional issues also requires this Court's supervisory correction in order to enforce the long-established rule that where any legal basis exists to affirm the district court, the appellate court should consider that basis. Where any legal basis exists to affirm a district court's decision, the appellate court should affirm. *See e.g., Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) ("a successful party in the District Court may sustain its judgment on any ground that finds

support in the record"); *see also Dandridge v. Williams*, 397 U.S. 471, 475 (1970) ("the judgment of the District Court must, of course, be affirmed if the [law in question] is in conflict with ... the Constitution"). Thus the "general rule that matters not raised in, or considered by, [the] court below cannot be invoked on appeal, even though such matters involve constitutional questions, applies only to appellants and not to appellees." 4 C.J.S. *Appeal and Error* § 208 n.81.

Here, Christians, as appellee in the court of appeals, was entitled to consideration of her constitutional arguments because those arguments would, if correct, have provided the necessary basis for affirming the lower courts' decisions. Indeed, both the bankruptcy court and the district court had supported their decisions on the basis that the Establishment Clause could not permit the Church to prevail. Yet the court of appeals improperly failed to consider either the Establishment Clause argument or the Separation of Powers argument.

Two of the three judges on the Eighth Circuit panel have, at or before the decision of this case, stated their opinion that RFRA is unconstitutional. *See Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir. 1996) (McMillian, J., dissenting in part); *Christians*, 82 F.3d at 1421 n.1 (Bogue, S.D.J., dissenting). In Judge Bogue's word, it was "unusual" for the panel to make its decision based on a statute that, in the opinion of the majority of the panel, is unconstitutional. It is important that this Court enforce the principle that parties are entitled to equal and full, not discretionary, enforcement of the constitutional rights they assert.

Because the court of appeals failed to consider Christians' constitutional arguments, this Court may alternatively, in the exercise of its supervisory powers, remand the case to the court of appeals to deal with the constitutional question. *See Dandridge*, 397 U.S. at 475 n. 6 ("When attention has been focused on other issues or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court."); *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947) (same); *United States v. Ballard*, 322 U.S. at 88 (same).

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. In the alternative, in the exercise of its supervisory powers, this Court should remand the case to the court of appeals to address the parties' constitutional arguments.

Respectfully submitted,

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In re Bruce YOUNG; In re Nancy Young.

Julia A. CHRISTIANS, Appellee,

United States of America, Intervenor,

v.

CRYSTAL EVANGELICAL FREE CHURCH, Appellant.

Christian Legal Society; The National Association of Evangelicals; Americans United for Separation of Church and State; Concerned Women for America; The Baptist Joint Committee on Public Affairs; The Southern Baptist Convention; The General Conference of Seventh-Day Adventists; The Evangelical Luthern [sic] Church in America, Amicus Curiae.

United States Senator Orrin G. Hatch; The Church of Jesus Christ of Latter-Day Saints; Catholic League for Religious and Civil Rights; Traditional Values Coalition; Worldwide Church of God, Amicus Curiae.

No. 93-2267.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 15, 1994.

Decided May 6, 1996.

Petition for Rehearing and Suggestion for Rehearing En Banc Denied June 27, 1996.*

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* Judge Beam wrote an opinion specially concurring in the denial of the petition for rehearing en banc. The opinion will be published in a later volume of F.3d.

Appeal from the United States District Court for the District of Minnesota; Harry H. MacLaughlin, Judge.

Kenneth Corey-Edstrom, Brooklyn Center, MN, argued, for appellant.

Douglas Laycock, Austin, TX, argued, for amici curiae.

Richard Thomas Thomson, Minneapolis, MN, argued, for appellee.

Before McMILLIAN and MAGILL, Circuit Judges, and BOGUE,* District Judge.

McMILLIAN, Circuit Judge.

The Crystal Evangelical Free Church (hereinafter the church) appeals from a final order entered in the District Court for the District of Minnesota affirming an order entered in the Bankruptcy Court for the District of Minnesota that required the church to turn over to trustee Julia A. Christians certain funds debtors Bruce and Nancy Young had contributed to the church as tithes during the year preceding the filing of their petition for bankruptcy. *In re Young*, 148 B.R. 886 (Bankr.D.Minn.1992), *aff'd*, 152 B.R. 939 (D.Minn.1993). For reversal, the church argues that the contributions were not avoidable under 11 U.S.C. § 548(a)(2) because the contributions were not made in exchange for less than "reasonably equivalent value." The church also argues that requiring it to turn over the contributions discriminates against religion and violates the free exercise clause of the first amendment. For the

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* The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

reasons discussed below, we reverse the order of the district court.

BACKGROUND FACTS

The facts are not disputed. The debtors are active members of the church. For several years, as part of their religious belief and practice, the debtors voluntarily contributed certain funds as tithes to the church; they did not receive money or tangible property in exchange for their contributions. Tithing is a spiritual and financial practice. Believers traditionally give a tithe, or tenth, of their income to a religious organization such as a church. See Lev. 27:1, 30, 32 (New International Version) ("The Lord said to Moses. . . . A tithe of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord. . . . The entire tithe of the herd and flock – every tenth animal that passes under the shepherd's rod – will be holy to the Lord."). The church teaches that Christians should offer regular contributions to support the work and message of the church. However, the church does not insist on a particular amount or require payment of membership or attendance fees. Members and non-members are welcome at worship services and other church services whether they tithe or not. It is not disputed that the debtors are sincere in their religious faith.

In February 1992 the debtors filed a joint Chapter 7 bankruptcy petition. During the year preceding the filing of their Chapter 7 petition, and at a time when they were insolvent, they contributed a total of $13,450.00 to the church. The trustee filed this adversary proceeding

against the church in order to recover those contributions as "fraudulent transfers" under 11 U.S.C. § 548(a)(2)(A).[1] The parties filed cross-motions for summary judgment. In order to avoid transfers under 11 U.S.C. § 548(a)(2)(A), the trustee must prove that (1) there was a transfer of the debtors' interest in property (2) made on or within a year preceding the filing of the petition (3) while the debtors were insolvent (4) in exchange for which the debtors received less than reasonably equivalent value. The parties stipulated to the existence of the first three factors; the only factor in dispute was whether the debtors received "reasonably equivalent value" "in exchange for" their contributions to the church.

DECISION OF THE BANKRUPTCY COURT

The bankruptcy court granted the trustee's motion for summary judgment and denied the church's motion. The bankruptcy court held that the debtors' contributions to the church were avoidable transfers under

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[1] 11 U.S.C. § 548(a) provides in part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

. . . .

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

. . . .

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

§ 548(a)(2)(A) because the debtors did not receive "reasonably equivalent value" "in exchange for" their contributions. 148 B.R. at 890-93. The bankruptcy court concluded that "value" referred solely to economic value, that is, "property" in a physical or material sense, and that religious services, theological programs and access to the church's facilities did not meet this economic definition of value. *Id.* at 891, 895-96 (rejecting *In re Moses*, 59 B.R. 815, 818 (Bankr.N.D.Ga.1986) (*Moses*) (holding church services constitute property within meaning of § 548), and *In re Missionary Baptist Foundation of America*, 24 B.R. 973, 979 (Bankr.N.D.Tex.1982) (*Upreach*) (holding good will constituted reasonably equivalent value in exchange for charitable contributions to church)).

The bankruptcy court also concluded that the contributions were not economically beneficial to the debtors. 148 B.R. at 893. In the bankruptcy court's view, any benefit was strictly religious and thus merely incidental and enjoyed by the debtors individually and not by either their pre-petition or post-petition estate. *Id.* at 893-94 & n. 10. The bankruptcy court also noted that the judicial system cannot differentiate between "religious" benefits and "secular" benefits, much less put a value on those benefits, and that any value calculation would be "fraught with the sort of entanglement that the Constitution forbids," and that the debtors' contributions to the church were thus avoidable as fraudulent transfers under § 548(a)(2)(A). 148 B.R. at 893-96 & n. 13, 896 & n. 17 (noting potential excessive entanglement problems in having courts calculate value of religious services, even though parties did themselves did not raise first amendment concerns).

The bankruptcy court also determined that, even assuming the debtors received value, that value had not been received "in exchange for" their contributions because no exchange took place. *Id.* at 895-96. As noted by the bankruptcy court, the church made available worship services and religious programs to all members, including the debtors, without in any way linking those services to financial contributions. *Id.* at 894 (noting that debtors could not have received property in exchange for their contributions for purposes of § 548(a) and at the same time treated those contributions as charitable deductions under 26 U.S.C. § 170(c)(4)). *See Hernandez v. Commissioner*, 490 U.S. 680, 691, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989) (quid pro quo is inconsistent with charitable contribution); *United States v. American Bar Endowment*, 477 U.S. 105, 118, 106 S.Ct. 2426, 2433-34, 91 L.Ed.2d 89 (1986) ("The sine qua non of a charitable contribution is a transfer of money or property without adequate consideration."). The bankruptcy court declared the transfers void and ordered the trustee to recover from the church $13,450.00, plus interest and costs. The church appealed the decision of the bankruptcy court to the district court.

DECISION OF THE DISTRICT COURT

On appeal, the district court affirmed the bankruptcy court's statutory interpretation and analysis of § 548(a)(2)(A) and agreed that the debtors did not receive "reasonably equivalent value" for their contributions to the church. 152 B.R. at 948. The district court also found that neither the religious services nor the tax deductions

for charitable contributions constituted reasonably equivalent value under § 548(a)(2)(A). *Id.* at 948-49. The district court agreed with the bankruptcy court's decision not to follow *Upreach* and *Moses*. In the district court's view, good will and church services are not the kind of "fairly concrete" benefits required to constitute reasonably equivalent value, and neither case addressed the "in exchange for" requirement. *Id.* at 950. The district court noted that church services and charitable deductions were not given "in exchange for" the debtors' contributions. *Id.* at 949-50. The district court also distinguished *Moses* from the present case on the ground that in *Moses* the church had required the contributions as a condition of the debtor's employment as a deacon. *Id.* at 950. In the present case the parties stipulated that the debtors were not required to contribute in order to attend church services or otherwise participate in church programs.

On appeal in the district court, the church argued for the first time that applying § 548(a) would violate the free exercise and establishment clause of the first amendment. The district court exercised its discretion to consider the constitutional arguments and rejected them. The district court first held that the church had standing to raise the constitutional rights of the debtors in addition to its own. *Id.* at 950-51 (debtors could not effectively assert their free exercise rights because they are not parties in this proceeding). The district court then applied *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (Smith), and held that the church's free exercise claim failed on the merits because the Bankruptcy Code was a neutral law of general applicability which has only an incidental effect on religion. 152 B.R. at 953-54. The

district court held in the alternative that, even if the pre-*Smith* free exercise test applied, "[t]he government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling [governmental] interest." *Id.* at 954.

The district court also held that § 548(a) did not unfairly discriminate against religious contributions, *Id.* at 954, and that the debtors' "hybrid" right to free speech and free exercise was not impaired because limiting the amount an individual may contribute to a cause or organization only marginally restricts the contributor's ability to communicate that particular message. *Id.* The district court noted that § 548(a)(2)(A) was narrowly drawn and content-neutral, protected an important governmental interest in maximizing the debtors' estate, and did not violate the doctrine of separation of church and state. *Id.* at 954.

Finally, the district court held that § 548(a) did not violate the establishment clause. *Id.* at 955. The district court applied the *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), entanglement test and found that § 548 has a secular purpose, to maximize the size of the debtor's estate; its primary effect neither advances nor inhibits religion; and its enforcement does not threaten excessive entanglement between church and state. 152 B.R. at 955. The district court agreed with the bankruptcy court that attempting to quantify the value received by the debtors in exchange for their contributions to the church could lead to exactly the sort of entanglement the Constitution forbids. *Id.* This appeal followed.

CERTIFICATION OF CONSTITUTIONAL QUESTION

On November 13, 1993, after the district court had filed its decision and while this appeal was pending, President Clinton signed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.[2] For this reason, questions about the application of the RFRA (or its constitutionality) were not presented to the district court. Pursuant to the court's request, the parties filed supplemental briefs addressing the applicability of the RFRA.

While preparing for oral argument, this court recognized, albeit belatedly, that certification under 28 U.S.C. § 2403(a) was required because the appeal questioned the constitutionality of a provision of the bankruptcy code affecting the public interest and the United States was not a party. Accordingly, we removed the case from the argument calendar and certified the appeal to the Attorney General and invited the United States to intervene in the

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[2] The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, provides in part:

> (a) IN GENERAL – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

appeal on the question of constitutionality of 11 U.S.C. § 548(a) if it so desired. *See* 28 U.S.C. § 2403(a); Fed.R.App.P. 44; Fed.R.Civ.P. 24(c). The parties had not requested the bankruptcy court, the district court or this court to notify the Attorney General, and the district court and the bankruptcy court had not realized that 28 U.S.C. § 2403 requires notification of the Attorney General whether or not it is requested by the parties. Nonetheless, "[f]ailure to notify the Attorney General is not a jurisdictional defect, and belated notice satisfies any requirement." *Tonya K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir.1988) (citations omitted). Certification has occurred even after judgment at the appellate level. *E.g., Merrill v. Town of Addison*, 763 F.2d 80, 83 (2d Cir.1985) (citing cases). "The rule is designed to give the Executive Branch both the time to make its views known and the opportunity to intervene in order to take a direct appeal to the Supreme Court if the decision should be adverse to the statute's constitutionality." *Tonya K. v. Board of Education*, 847 F.2d at 1247. No practical purpose would have been served in remanding the case to the bankruptcy court or the district court for purposes of certification, and the belated certification did not prejudice or otherwise impair the ability of the United States to fully present its views on the question of the constitutionality of § 548(a). *See Merrill v. Town of Addison*, 763 F.2d at 83.

Following certification, the United States decided to intervene in the case and filed a brief supporting the position of the trustee and defending the constitutionality of § 548(a)(2)(A) under both Smith and the RFRA. Several

amicus briefs were filed in support of the church's position.[3] Oral arguments were held in September 1994. However, immediately before oral argument, the United States ended its participation in the case as intervenor and withdrew its brief. The decision of the United States to withdraw surprised the parties and the court, but counsel for the trustee was substituted for the United States at the last moment and ably presented oral argument.

STANDARD OF REVIEW

We review the grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of identifying "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting

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[3] Amicus briefs were filed in support of the church on behalf of the Christian Legal Society, the National Association of Evangelicals, Americans United for Separation of Church and State, Concerned Women for America, the Baptist Joint Committee on Public Affairs, the Southern Baptist Convention, the General Conference of Seventh-Day Adventists, and the Evangelical Lutheran Church in America; the Church of Jesus Christ of Latter-Day Saints; and United States Senator Orrin G. Hatch.

Fed.R.Civ.P. 56(c)). Once the moving party has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings; rather, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Although we view the facts in the light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

In the present case, there are no genuine issues of material fact in dispute because the parties stipulated to the relevant facts and because the issues raise only questions of law.

The church's principal argument on appeal is that requiring the church to return these contributions violates the free exercise clause of the first amendment. The church relied on *Smith* in its main brief but also raised a RFRA compelling governmental interest argument in its supplemental brief. The church also argues that the district court erred in applying 11 U.S.C. § 548 to these contributions and in finding that the debtors did not receive "reasonably equivalent value" "in exchange" for their contributions to the church. We will discuss the statutory arguments first.

"FRAUDULENT" TRANSFERS UNDER 11 U.S.C. § 548(a)(2)

The section of the bankruptcy code under which the trustee recovered the contributions at issue, 11 U.S.C.

§ 548, is captioned "fraudulent transfers and obligations." As a preliminary matter, the church argues that this caption is not merely "unfortunate" but significant because the purpose of the section is to avoid transfers made with fraudulent intent or at least under circumstances under which a transfer may be considered fraudulent. The church argues that the section was not drafted with bona fide charitable contributions in mind and that in the present case there is no question of fraudulent intent. The church notes that the debtors did not change the frequency or amount or the recipient of their contributions in the face of their changing financial circumstances.

The term "fraudulent" in the caption of 11 U.S.C. § 548 is inapposite and, at least with respect to § 548(a)(2), can certainly be misleading. *In re Newman*, 183 B.R. 239, 245 & n. 9 (Bankr.D.Kan.1995). It may be, as the district court noted, that "describing the [debtors' contributions] as 'avoidable transfers' rather than 'fraudulent transfers' may be more appropriate because it lessens the [unwarranted] inference of culpability." 152 B.R. at 950. Fraudulent intent is not required to recover transfers made within one year of the bankruptcy filing under § 548(a)(2). *Compare* 11 U.S.C. § 548(a)(1) (under which fraudulent intent is required to avoid transfers). Section § 548(a)(2) requires only "constructive fraud," not actual intent to defraud. "A transfer is constructively fraudulent if an insolvent debtor transfers some of its property for less than reasonably equivalent value." *In re Newman*, 183 B.R. at 245 n. 9. In the present case the trustee has not accused the debtors and the church of any improper conduct, much less actual fraud. What is important, however, is not the misleading caption but that the trustee

was not required to prove actual fraud in order to recover the contributions under § 548(a)(2)(A). We next consider the church's substantive statutory argument.

In order to find a fraudulent transfer, or, more accurately, an avoidable transfer, has occurred under 11 U.S.C. § 548(a)(2), the trustee must prove by a preponderance of the evidence that (1) there was a transfer of an interest of the debtor in property, (2) the transfer was made within one year before the date of the filing of the petition, (3) the debtor was insolvent on the date the transfer was made, and (4) the debtor received less than a reasonable equivalent value in exchange for the transfer. 152 B.R. at 945 (citations omitted). In the present case the parties stipulated that the first three elements were satisfied, and the only issue was whether the debtors had received "reasonably equivalent value" "in exchange for" their contributions to the church. *Id.* As noted above, the district court concluded that the debtors' contributions were gratuitous transfers, *Id.* at 948, and that religious or spiritual support did not constitute "reasonably equivalent value." *Id.* at 949-50. The district court also concluded that, even assuming the church services did constitute "reasonably equivalent value," in the present case the church's services had not been provided "in exchange for" the debtors' contributions because the parties stipulated that the church services were available regardless of whether or not they made any contributions. *Id.*

On appeal the church argues the district court erroneously defined "value" to include only tangible property and ignored how the debtors valued what they received from the church. The church argues that "value"

includes indirect economic benefits and that the debtors received "value" in the form of tax deductions for charitable contributions, church membership and spiritual counseling, and, more concretely, access to church facilities because contributions from the debtors and others helped pay for the church's operating expenses. The church also argues that the district court erred in concluding that the contributions were not made "in exchange for" the indirect economic benefits the debtors received in the form of church services. The church argues a nexus existed between the contributions and those benefits because the debtors made the contributions during the same time period they received the benefits.

Title 11 U.S.C. § 548(d)(2)(A) defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or the relative of the debtor." In the present case it was undisputed that the church did not satisfy or secure a present or antecedent debt of the debtors; the only issue was whether the debtors received some sort of "property" or "property right," and therefore "value," from the church. The bankruptcy court decided that the debtors did not receive any economic benefit from the church services. 148 B.R. at 893-94. The bankruptcy court noted that although the debtors received substantial spiritual comfort from the church services, *id.* at 891 n. 7, the church services did not provide them, much less their pre-petition estates, with any "tangible or recognizable economic benefit," "marketable financial value or economic utility from a creditor's point of view." *Id.* at 894. We agree that the bankruptcy court over-emphasized the

financial or economic considerations in defining "value" under § 548. "[T]he requirement of economic benefit to the debtor does not demand consideration that replaces the transferred property with something else tangible or leviable that can be sold to satisfy the debtor's creditor's claims." 2 David G. Epstein, *Bankruptcy* § 6-49, at 23 (1992).

Unlike the bankruptcy court, however, the district court did not define "value" only in terms of tangible property or marketable financial value. The district court correctly examined "all aspects of the transaction and carefully measure[d] the value of all benefits and burdens to the debtor, direct or indirect," including "indirect economic benefits." 152 B.R. at 945. The district court required only that the indirect economic benefits be "fairly concrete." *Id., citing In re Minnesota Utility Contracting, Inc.*, 110 B.R. 414, 420 (D.Minn.1990) (*MUC*) (bank required corporation to grant bank a security interest in its assets to extend additional line of credit to a second corporation owned by same shareholders; indirect economic benefit to first corporation could be "reasonably equivalent value" as long as indirect economic benefit was "fairly concrete"; no evidence that first corporation received any indirect economic benefits). What "fairly concrete" means is not clear. However, the district court clearly did not define "property" in general, or "indirect economic benefit" in particular, only in terms of legal or equitable rights or ownership interest. *Compare* 148 B.R. at 891 (bankruptcy court arguably limited "property" to legal or equitable rights and things subject to ownership) *with id.* at 893-94 (value requires transfer of economic benefit to debtor's estate); *cf. In re Newman*, 183

B.R. at 247 (noting that tithing does not give debtors enforceable property right, contract right or equitable right to attend or partake in services offered by church).

In any event, in the present case, whether the debtors received any economic benefit from the church services is beside the point. Even assuming that the debtors received "reasonably equivalent value,"[4] the stipulated facts in the present case precluded any finding that the debtors made their contributions "in exchange for" the church services. 152 B.R. at 949, 148 B.R. at 893. Section 548 contemplates a quid pro quo. In the present case the parties' stipulations are inconsistent with a quid pro quo. The debtors stipulated that they made the contributions out of a sense of religious obligation and not in order to attend church (or receive a tax deduction). The parties also stipulated that the church services were available to all regardless of whether any contributions were made. In other words, the debtors' contributions were purely voluntary and in

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[4] Finding that the church services had some economic benefit and that the debtors made the contributions in exchange for those services would call into doubt treating those contributions as deductible charitable contributions. *See Hernandez v. Commissioner*, 490 U.S. 680, 690-91, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989) (charitable contributions are only deductible if made without adequate consideration; payments made to a religious organization in exchange for a benefit to the taxpayer, even a "purely religious" benefit, do not qualify as charitable contributions).

For purposes of analysis, we have also assumed that the contributions and the church services were reasonably equivalent and thus need not take up the constitutionally suspect and difficult task of attempting to value the church services.

no way linked to the availability of church services. Similarly, the church conducted worship services and provided other services independent of the debtors' contributions. Under the stipulated facts, there was no quid pro quo, no exchange of contributions for church services.[5]

Because the debtors did not receive the church services "in exchange for" their contributions, the contributions were avoidable transfers and were recoverable by the trustee under 11 U.S.C. § 548(a)(2).

FREE EXERCISE OF RELIGION

Having concluded that the debtors' contributions were avoidable transfers and recoverable by the trustee under bankruptcy law, we turn now to the church's first amendment arguments. The parties' arguments on the

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[5] In fact, as one would expect, given the religious context, the absence of any nexus between tithing and the availability of religious services is typical of the case law in this area. *See, e.g., In re Tessier,* 190 B.R. 396, 399 (Bankr.D.Mont.1995) (church would welcome and fully accept debtors without or without tithing); *In re Newman,* 183 B.R. 239, 248 (Bankr.D.Kan.1995) (noting that debtors would have tithed in same amount even if church reduced services and that church would have provided services to debtors even if they had reduced their tithe or not tithed at all); *In re Lees,* 192 B.R. 756, 758 (Bankr.D.Mont.1994) (no indication that debtors could no longer attend or would lose any privileges at church if reduced or eliminated tithing); *In re Packham,* 126 B.R. 603, 608 (Bankr.D.Utah 1991) (only speculation by debtors that the church would deny them a temple recommend if they failed to tithe). *But cf. In re Moses,* 59 B.R. 815, 818 (Bankr.N.D.Ga.1986) (contributions required as condition of debtor's employment by the church as a deacon).

merits are related and, to a certain degree, repetitive. Because we hold that requiring the church to return the debtors' contributions violates the RFRA, we do not reach the merits of the constitutional issues.

As noted above, even though the church did not raise any constitutional arguments in the bankruptcy court and raised them for the first time on appeal in the district court, the district court exercised its discretion to consider the constitutional arguments on appeal. The trustee argues that this is not the kind of extraordinary case that warrants an exception to the general rule that a reviewing court should not consider issues raised for the first time on appeal. *E.g., United States Trustee v. Harris*, 960 F.2d 74, 78 (8th Cir.1992). We hold that the district court did not abuse its discretion in considering the constitutional arguments raised by the church for the first time on appeal. The constitutional arguments raised by the church for the first time on appeal involved purely legal issues. No additional evidence or argument would have affected the outcome of the case. *E.g., Universal Title Insurance Co. v. United States*, 942 F.2d 1311, 1314-15 (8th Cir.1991).

STANDING

The trustee also argues the church lacks standing to raise the free exercise rights of the debtors, who were not parties in the adversary proceeding in bankruptcy court or on appeal in the district court (or on appeal in this court). We hold that the church has standing to raise the free exercise rights of the debtors. *See In re Newman*, 183 B.R. at 249. This issue involves the concept of third-party

standing. Standing is a jurisdictional prerequisite, and in general parties must raise their own legal rights. However, a litigant can raise the free exercise rights of a third party if the third party cannot effectively assert those rights. *McGowan v. Maryland*, 366 U.S. 420, 430, 81 S.Ct. 1101, 1107-08, 6 L.Ed.2d 393 (1961) (department store challenging Sunday closing law could not raise free exercise rights of patrons). We agree with the district court that the debtors could not have effectively asserted their free exercise rights. The trustee, representing the debtors' estates, and the church were the parties in this adversary proceeding; the debtors were not. As noted by the district court, there was no indication that the debtors were able to assert their free exercise rights in another forum. In addition, the interests of the church and the debtors, who are members of the church, were sufficiently similar so that the church would be an effective representative of the debtors' free exercise rights.

RETROACTIVE APPLICATION OF RFRA

Although the RFRA was enacted after the district court's decision, the RFRA provides that it "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." RFRA § 6(a), 42 U.S.C. § 2000bb-3(a). The RFRA defines the term "government" broadly to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." *Id.* § 5(1), 42 U.S.C. § 2000bb-2(1). The bankruptcy code is federal law, the federal courts are a branch of the United States, and our decision in the

present case would involve the implementation of federal bankruptcy law. We and other circuits have held that the RFRA applies retroactively in other contexts. *E.g., Hamilton v. Schriro*, 74 F.3d 1545, 1549 (8th Cir.1996); *Holterman v. Helling*, 70 F.3d 1276 (8th Cir.1995) (table); *Brown-El v. Harris*, 26 F.3d 68, 69 (8th Cir.1994); *see also Flores v. City of Boerne*, 73 F.3d 1352, 1355 (5th Cir.1996) (city historic preservation ordinance); *Droz v. Commissioner*, 48 F.3d 1120 (9th Cir.1995) (Social Security taxes), *cert. denied*, ___ U.S. ___, 116 S.Ct. 698, 133 L.Ed.2d 656 (1996). Bankruptcy courts in other jurisdictions have applied the RFRA retroactively. *See, e.g., In re Tessier*, 190 B.R. 396, 403 (Bankr.D.Mont.1995) (applying RFRA to protect tithing, but holding RFRA is unconstitutional); *In re Newman*, 183 B.R. at 251 (holding RFRA does not protect tithing).

RFRA

On the merits the church argues that requiring the return of these contributions unfairly discriminates against religion in general and, more specifically, against religions (and the members of those religions) that believe in tithing. The church argues that exempting a personal residence or tools of a trade or household goods, *see* 11 U.S.C. § 522(d), but not religious contributions discriminates against religion. The church also argues that requiring the return of contributions discriminates against religions on the basis of the way in which they are supported. Some religions, like the church, emphasize tithing; others rely upon personal services, contributions from the public, fees for services, donations, or membership dues. The church also argues that, even among those religions that rely upon donations, religions like the

church that encourage tithing at the traditional level of 10% are much more attractive to a trustee looking for potential assets than other religions. Brief for Appellant at 13 (table listing average % of household income donated to charity by denomination as 1.3 to 3.8%, much less than 10%).

For the reasons discussed below, we hold that the recovery of the contributions substantially burdens the debtors' free exercise of their religion and is not in furtherance of a compelling governmental interest and therefore violates the RFRA. In light of this holding and because the RFRA is more protective of the right of free exercise than *Smith*, *see, e.g.*, *Flores v. City of Boerne*, 73 F.3d at 1361 (describing RFRA as "a substantive expansion of First Amendment doctrine" and in effect "an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts – that is, strict scrutiny versus a form of intermediate scrutiny"), we need not consider whether the recovery of the contributions violates Smith. The parties did not raise the question of the constitutionality of the RFRA, and we do not consider the constitutionality of the RFRA. *See id.* at 1356-64 (holding Congress has authority under § 5 of fourteenth amendment to enact RFRA and RFRA does not usurp judiciary's power to interpret the Constitution). This circuit has applied the RFRA in other cases without questioning its constitutionality and thus has at least implicitly held that the RFRA is constitutional. *But cf. Hamilton v. Schriro*, 74 F.3d at 1557 (McMillian, J., dissenting) (arguing that the RFRA is unconstitutional because Congress does not have power under § 5 of the fourteenth amendment to enact RFRA);

Tessier, 190 B.R. at 405-07 (holding RFRA is inconsistent with *Smith* and violates the separation of powers doctrine).

In *Smith* the Supreme Court held that the first amendment's free exercise clause does not bar application of a facially neutral law of general application to religiously motivated conduct. 494 U.S. at 881, 110 S.Ct. at 1601. In *Smith* two members of the Native American Church claimed that the state unfairly denied them unemployment compensation because their religious use of peyote was determined to be misconduct. The Court held that the free exercise clause did not bar the state from prohibiting sacramental peyote use and therefore denying unemployment benefits to Native Americans discharged for using peyote. *Id.* at 890, 110 S.Ct. at 1606. The Court expressly rejected the application of the compelling governmental interest and least restrictive means test set forth in cases like *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), as unworkable and unnecessary in free exercise analysis. 494 U.S. at 885, 886-90, 110 S.Ct. at 1603-04, 1604-06. Justice Scalia explained that whereas application of the compelling governmental interest test in fields such as equal protection or free speech produces constitutional norms, in the free exercise context it produces a "constitutional anomaly," that is, a private right to ignore generally applicable laws. *Id.* at 886, 110 S.Ct. at 1604 (footnote omitted). Justice Scalia emphasized that " '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.' " *Id.* at 887, 110 S.Ct. at 1604, *citing Hernandez v. Commissioner*, 490 U.S. at

699, 109 S.Ct. at 2148. Justice Scalia cautioned that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." 494 U.S. at 887, 110 S.Ct. at 1604.

Concerned that *Smith* did not adequately protect free exercise rights, in 1993 Congress passed the RFRA expressly in response to *Smith*. Congress intended "to restore the compelling [governmental] interest test" as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), "to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b)(1), (2), "even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a).

The threshold inquiry under the RFRA is whether the governmental action in question "substantially burdens" a person's religious practice. This is a question of law which we review de novo. *Hamilton v. Schriro*, 74 F.3d at 1552. The individual has the burden of establishing the existence of substantial burden. 42 U.S.C. § 2000bb-1(a). "[T]he governmental action must burden a religious belief rather than a philosophy or a way of life. [T]he burdened belief must be sincerely held by the [person]." *Werner v. McCotter*, 49 F.3d 1476, 1480 n. 1 (10th Cir.) (citing *Wisconsin v. Yoder*, 406 U.S. at 215-19, 92 S.Ct. at 1533-35), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2625, 132 L.Ed.2d 866 (1995). In order to be considered a "substantial" burden, the governmental action must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious]

beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." *Werner v. McCotter*, 49 F.3d at 1480. Assuming for purposes of analysis that courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance, defining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA's purpose to restore pre-*Smith* free exercise case law. *See Sasnett v. Sullivan*, 908 F.Supp. 1429, 1440-45 (W.D.Wis.1995) (extensive discussion of "substantial burden" requirement).

For purposes of analysis, we can assume that the recovery of these contributions would substantially burden the debtors' free exercise of religion. Even though the church encourages but does not compel tithing, the debtors consider tithing to be an important expression of their sincerely held religious beliefs. In other words, in the present case, tithing is religiously motivated, but not religiously compelled, practice. Permitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions. We do not think it is relevant that the debtors can continue to tithe or that there are other ways in which the debtors can express their religious beliefs that are not affected by the governmental action. It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than

minimal significance in a way that is not merely incidental. *Cf. In re Tessier,* 190 B.R. at 403-04 (debtors testified that even though church would not sanction them for failing to tithe, their faithful exercise of their religion is "contingent" upon their continuing to tithe; holding that not allowing debtors to tithe under Chapter 13 plan substantially burdens free exercise right; however, noting that Chapter 7 trustee may attack religious giving by bringing a fraudulent transfer action against the religious institution under 11 U.S.C. § 548(a), as was done in the present case, or by dismissing the Chapter 7 case for substantial abuse under 11 U.S.C. § 707(b)). *But cf. In re Newman,* 183 B.R. at 251 (recovery of tithes already paid does not substantially burden free exercise because it does not prevent debtors from continuing to tithe; no evidence that 11 U.S.C. § 548(a)(2) prevented debtors, or any other member of church, from fulfilling their personally-held religious obligation to tithe at any time).

The next question is whether there is a compelling governmental interest. Once the individual has shown that the governmental action substantially burdens his or her free exercise right, the government must demonstrate that the substantial burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). These are questions of law which we review de novo. *Hamilton v. Schriro,* 74 F.3d at 1552. The RFRA does not define "compelling governmental interest." Compelling governmental interests have been described in a post-Smith establishment clause case as "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113

S.Ct. 2217, 2233, 124 L.Ed.2d 472 (1993). However, pre-*Smith* case law is instructive. For example, *Hernandez v. Commissioner*, 490 U.S. at 699, 109 S.Ct. at 2148-49, held that the governmental has a compelling interest in maintaining the tax system. *United States v. Lee*, 455 U.S. 252, 258-59, 102 S.Ct. 1051, 1055-56, 71 L.Ed.2d 127 (1982), held that the government has a compelling interest in enforcing participation in the social security system. Case law has recognized a compelling governmental interest in maintaining national security and public safety, *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 441-42, 88 L.Ed. 645 (1944). *Wisconsin v. Yoder*, 406 U.S. at 213, 92 S.Ct. at 1532, held that the government has a compelling interest in providing public education. However, in *Sherbert v. Verner*, 374 U.S. at 406, 83 S.Ct. at 1795, the Court found no compelling governmental interest in preventing fraud in the unemployment compensation system. Cases applying the RFRA have held that the government has a compelling interest in enforcing participation in the social security system, *Droz v. Commissioner*, 48 F.3d at 1122-23, and in maintaining safety and security in prisons, *Hamilton v. Schriro*, 74 F.3d at 1554, and schools, *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir.1995) (ban on wearing of ceremonial knives on campus), as well as in providing public education, *Fleischfresser v. Directors of School District 200*, 15 F.3d 680, 690 (7th Cir.1994) (reading skills program described as anti-Christian).

In the present case the question is whether the bankruptcy code in general and § 548(a)(2)(A) in particular constitute a compelling governmental interest. The

trustee argues the bankruptcy code in general, and § 548(a)(2)(A) in particular, furthers the compelling governmental interests in allowing debtors to get a fresh start while at the same time protecting the interests of creditors by maximizing the debtor's estate. The bankruptcy cases decided under the RFRA are split. In *In re Newman*, 183 B.R. at 252, a case which, like the present case, involved an adversary proceeding brought by the Chapter 7 trustee to recover as fraudulent transfers under 11 U.S.C. § 548(a)(2) sums that the debtors had contributed to their church, the bankruptcy court concluded that § 548(a), and the Bankruptcy Code as a whole, served a compelling governmental interest. The Newman court specifically noted the important policies of allowing debtors to get a fresh start, treating creditors as fairly as possible, and the administration of the bankruptcy system, as well as the historical importance of recovery of fraudulent transfers to bankruptcy law. *Id. Cf. In re Navarro*, 83 B.R. 348, 353 (Bankr.E.D.Pa.1988) (pre-RFRA; administration of bankruptcy system and protection of legitimate interests of creditors are compelling governmental interests). The *Newman* court also found that 11 U.S.C. § 548(a)(2) was the least restrictive means of furthering the compelling governmental interest. 183 B.R. at 252.

In comparison, the bankruptcy court in *In re Tessier*, 190 B.R. at 405, found no compelling governmental interest. However, *In re Tessier* arguably interpreted the compelling governmental interest requirement more narrowly than *In re Newman* to include in the free exercise context "only those interests pertaining to survival of the republic or the physical safety of its citizens." *Id. In re Tessier* is

procedurally distinguishable from the present case because it involved a Chapter 13 trustee's objection to the debtors' reorganization plan. Nonetheless, it is substantively similar to the present case because the trustee objected to the debtors' charitable contribution of $100 per month to their church, in other words, a tithe. The *Tessier* court acknowledged that "the government clearly has interests in . . . providing the debtor with a fresh start, efficiently administering bankruptcy cases, [and] protecting the interests of creditors," but concluded that such interests fell "short of direct national security and public safety concerns." *Id.* The *Tessier* court concluded that these interests, although "rational, and even important," were "not sufficiently grave to deserve the 'compelling' label when balanced against a parishioner's free exercise of religion." *Id., citing Sherbert v. Verner*, 374 U.S. at 406, 83 S.Ct. at 1795 (the key compelling governmental interest case which rejected the government's claim that preventing fraud in unemployment compensation was a compelling governmental interest). The *Tessier* court then held that the RFRA was unconstitutional, and thus had no effect on the bankruptcy code, because its restoration of the substantial burden/ compelling governmental interest test was inconsistent with *Smith's* "valid and neutral law of general applicability" test for free exercise claims and violated the separation of powers doctrine. 190 B.R. at 405-07.

We agree with *In re Tessier* that the interests advanced by the bankruptcy system are not compelling under the RFRA. Although we would not necessarily interpret compelling governmental interests as narrowly as the *Tessier* court did, we agree that bankruptcy is not comparable to

national security or public safety. We also agree that allowing debtors to get a fresh start or protecting the interests of creditors is not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system, which have been recognized as compelling governmental interests in the face of a religious exercise claim. *See, e.g., Droz v. Commissioner*, 48 F.3d at 1122-24. Moreover, we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system as a whole; its effect will necessarily be limited to the debtor's creditors, who will as a result have fewer assets available to apply to the outstanding liabilities, and not all creditors or even all debtors. This is not to say that the recognition of a free exercise exception under these circumstances may not have adverse economic consequences for both creditors and debtors; for example, creditors may be more cautious in doing business with those who tithe or make contributions to religious organizations.

Because we hold that allowing debtors a fresh start and protecting the interests of creditors are not compelling governmental interests under the RFRA, we need not reach the question of whether the governmental action is the least restrictive means of furthering the compelling governmental interest.

In sum, we hold that because the substantial burden on the debtors' free exercise of religion is not furthered by a compelling governmental interest, the RFRA provides a defense against the order of the district court permitting the trustee to avoid the debtors' contributions

to the church under 11 U.S.C. § 548(a)(2)(A). The trustee is not entitled to recover $13,450 from the church.

Accordingly, the order of the district court is reversed.

BOGUE, Senior District Judge, dissenting.

While I agree with the majority's holding that the debtors did not receive reasonably equivalent value in exchange for the debtor's financial contributions to the church, I cannot agree with the decision on the merits under RFRA[1], and therefore respectfully dissent.

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[1] I understand that the constitutionality of RFRA is not before us as this case is currently postured. That notwithstanding, I feel compelled to note the unusual specter of employing the analytical framework of RFRA, where the author of the majority opinion has indicated his belief that RFRA is unconstitutional. *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir.1996)(McMillian, J., dissenting). Having reviewed and studied the author's thorough opinion in *Hamilton*, I am inclined to agree with his position. Further, cases relied on by the majority, regardless of the resolution on some issues, have ultimately found RFRA to be unconstitutional. *In re Tessier*, 190 B.R. 396, 406-07 (Bankr.D.Mont.1995). The constitutionality issue is particularly relevant in that employing RFRA, as opposed to the analysis under *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), "caused" the reversal in the current case, at least as I understand the *Smith* case. Put another way, "but for the passage of RFRA, the [church] could not have succeeded on [its] free exercise challenge to [11 U.S.C. § 5489(a)(2)]." *Hamilton*, 74 F.3d at 1561 (acknowledging that pre-RFRA standards were much less onerous as far as the government was concerned).

Given the statute's dubious constitutionality, I believe we should have requested supplementary briefing and hearing, along with certification to the Attorney General, on the constitutionality of RFRA.

The first step in RFRA analysis requires the plaintiff to establish that the challenged government action "substantially burdens" their free exercise of religion. If there is no substantial burden, the inquiry ends and the challenger's petition must fail. *In re Newman*, 183 B.R. 239, 251 (Bankr.D.Kan.1995) ("If there is no substantial burden, RFRA does not apply."). Courts have articulated various standards required to make a showing of substantial burden.

I agree with the majority that RFRA does not compel the church to show that tithing is "required" by the church in order to prove a substantial burden. It is enough if the allegedly impinged conduct is motivated by a sincereiy held religious belief. *Sasnett v. Sullivan*, 908 F.Supp. 1429, 1444 (rejecting a "religiously mandated" test in favor of a "religiously motivated" test for purposes of determining substantial burden).[2] That being said, it is important that the substantial burden step in the RFRA analysis is not reduced to a perfunctory determination or foregone conclusion. A searching inquiry is required to "protect[ ] the government from having to justify its regulations under a compelling interest standard if the burden on the asserted practice is incidental or de minimis." *Id.*

As stated by the majority, the governmental action must "significantly inhibit or constrain conduct or

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[2] I also share the majority's concern as to whether courts can constitutionally determine "the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance. . . . " Op. at 1418.

expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." Op. at 1418. Although it is undisputed that the debtors sincerely believe in tithing and that tithing is central to the religion they practice, I would conclude that the trustee's action of recovering monies tithed during the year the debtors were insolvent does not substantially burden the free exercise of their religion.

In coming to this conclusion, I note that the act of tithing by the debtors in the year preceding their filing for Chapter 7 protection was in fact executed, i.e., regardless of the eventual outcome, they were given the opportunity to practice their religion as they chose during the year they were insolvent. There was no "*constraint of conduct* or expression" respecting a central tenet of their belief, nor a curtailment of their ability to "*express adherence*" to their faith, nor were they denied reasonable opportunities to "*engage in those activities*" that were fundamental to their religion. They engaged in the conduct and activity of tithing and fully expressed adherence in their sincere belief in tithing to the church. Unfortunately, the debtors were insolvent during the year preceding February 1992 when they filed a joint Chapter 7 bankruptcy petition. As such the trustee properly sought to recover that for which the debtors did not receive reasonably equivalent value in exchange for their contributions to the church.

The trustee's act of recovering the tithes from the church under 11 U.S.C. § 548(a)(2) does not change the fact that the debtors did all they could in the way of expressing and practicing their religious beliefs. I agree with the court in *In re Newman*, which reasoned:

> there is no evidence that section 548(a) prevents the debtors or any other church member from tithing. Indeed, the present record certainly does not suggest that section 548 prevented these debtors from tithing. Equally important, the church has no records which might show that other members did not tithe because of section 548 since no one ever checks to see if members actually do tithe. The funds the trustee seeks to recover *have already been tithed to the defendant*. The debtors, in all likelihood, continue to tithe to the defendant. *The debtors fulfilled their religious obligation by tithing in the year prior to their bankruptcy filing*. The statute, by its own operation, does nothing to prevent the debtors' fulfillment of their personally held religious obligation to tithe and, therefore, does not place a "substantial burden" on the debtors' practice of their religion.

In re Newman, 183 B.R. at 251 (emphasis added).[3]

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[3] It cannot be denied that the work of religious organizations may be more important now than ever before. Contributing, financially or otherwise, to further the mission of a religious organization is a laudatory practice. That being said, religious contributions cannot be considered beyond reproach or regulation in all circumstances. *United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (" . . . every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs.

Further evidence of the lack of substantial burden is the uncontroverted fact that tithing is not required to fully participate in church services. As noted by the majority, the parties have stipulated that church services were available to all persons regardless of whether any contributions were made. The fact that the debtors' purely voluntary tithes were ordered retroactively recovered by the trustee does not change the fact that the debtors can attend church services, participate in church programs, and worship and believe as they choose. They can continue to tithe as has been their custom, assuming no additional bankruptcy filings. Given these facts, I cannot conclude the debtor's free exercise of religion was substantially burdened.

In my view, the church's failure to demonstrate a substantial burden would end the inquiry and would require affirmance. Yet even if section 548 worked a substantial burden on the debtors' religious practice, I would conclude that the statute serves a compelling governmental interest and is the least restrictive means of achieving said interest.

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."). The debtors should be commended for their commitment to contributing to the church. There is no dishonor in the fact that the tithes they offered during insolvency ought to be recovered by the trustee. The reality is that the tithed money should be part of the estate available to creditors, who in good faith, advanced money, goods or services to the debtors upon the condition of repayment.

Although stated in dicta, I agree with the district court's view that the bankruptcy code and § 548(a)(2)(A) furthers the compelling governmental interest in allowing debtors to get a fresh start while at the same time protecting the interests of creditors by maximizing the debtor's estate. *In re Young*, 152 B.R. 939, 954 (D.Minn. 1993); accord *In re Newman*, 183 B.R. at 252 ("Section 548(a), and the Bankruptcy Code as a whole, serve a compelling governmental interest."); *In re Navarro*, 83 B.R. 348, 353 (Bankr.E.D.Pa.1988) (the "administration of the bankruptcy system and protection of the legitimate interests of creditors" serves a compelling governmental interest).

It can be fairly said that our nation's economy depends extensively on the availability of credit to individuals and businesses. Bankruptcy is an extraordinary remedy for insolvent debtors and oftentimes harsh on creditors. One of the creditor's few protections are recovery statutes like section 548, which as of today includes a free exercise exception for religious giving in the year preceding filing for bankruptcy.

The majority may be correct when it admonishes that today's decision may not, by itself, undermine the integrity of the bankruptcy system as a whole. But I share the majority's apprehension that credit transactions involving persons with views similar to the current debtors may hereinafter involve a more probing and delicate inquiry. Given today's holding, are cautious potential creditors (including government or government-sponsored creditors) now expected to question applicants in depth regarding the highly personal activity of religious giving? And what if said application is denied on the grounds that the applicant's religious giving makes extending

credit an unwarranted risk? Pragmatic issues aside, it is enough that all of society has a compelling interest in maintaining the balance between debtors and creditors in its current state.

Finally, I would find that section 548(a)(2) is the least restrictive means of furthering the above-articulated compelling interest. Like the present action, *In re Newman* also involved a trustee's attempted recovery of tithed funds under 11 U.S.C. § 548(a)(2). In finding that section 548(a)(2) passes the least restrictive means test, the court noted:

> The portion of the statute at issue in this case only allows for recovery those transfers of the debtor's property which occurred within one year of the bankruptcy filing, occurred while the debtor was insolvent, and that were not given in exchange for reasonably equivalent value. Clearly, the statute was drawn in such a way as to balance the ability of the debtor to dispose of property with the need to protect unsecured creditors. For example, if in this case the debtors had not been insolvent on the dates that the transfers to the defendant took place, then the transfers would not be recoverable. Only when all of the requirements of § 548(a)(2) are met is the trustee able to recover the transfer.

In re Newman, 183 B.R. at 252.

The statute contains four specific elements, all of which are satisfied by the trustee in this case. The statute is narrowly tailored, and the trustee closely followed the proper procedures set forth in the Bankruptcy Code for avoiding and recovering the donations, and took no

action against these debtors which would not be taken against any other transferee in the same factual situation.

In conclusion, I would hold that the trustee has satisfied the requirements of RFRA and would affirm the district court.

In re Bruce YOUNG.
In re Nancy YOUNG.
Julia A. CHRISTIANS, Appellee,
United States of America, Intervenor,

v.

CRYSTAL EVANGELICAL FREE CHURCH, Appellant.

No. 93-2267.

United States Court of Appeals,
Eighth Circuit.

June 27, 1996.

Appeal from the United States District Court for the District of Minnesota; Harry H. MacLaughlin, Judge.

Prior Report: 82 F.3d 1407 (8 Cir.1996).

Kenneth Corey-Edstrom, Brooklyn Center, MN, argued, for appellant.

Douglas Laycock, Austin, TX, argued, for amici curiae.

Richard Thomas Thomson, Minneapolis, MN, argued, for appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

BEAM, Circuit Judge, specially concurring in the denial of the petition for rehearing en banc.

Although I generally agree with the ultimate disposition of this case, I want to emphasize that the court's decision cannot mean that all religious contributions by a bankruptcy debtor constitute a preferential transfer under the Bankruptcy Code. The court holds that even assuming the Youngs received some reasonably equivalent value from church services, they did not make their contributions "in exchange for" church services. While that may be true on the facts of this case, it would certainly not be true in the context of many religious contributions. For example, the United States Supreme Court has held that contributions to the Church of Scientology were in exchange for "an identifiable benefit, namely, auditing and training sessions" and thus were not tax deductible charitable contributions. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 691, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989). Moreover, in some synagogues, attendance at worship services for Jewish High Holy Days is predicated upon the purchase of a ticket or a reserved seat. See, e.g., id. at 709, 109 S.Ct. at 2153-54 (O'Connor, J., dissenting). Another example is the rule that Mormons must tithe ten percent of their gross income as a precondition to receiving a "temple recommend" – i.e., attending services and praying at the Central Church in Salt Lake City, Utah. See In re Bien, 95 B.R. 281 (Bankr.D.Conn.1989); see also Hernandez, 490 U.S. at 709, 109 S.Ct. at 2153-54. As a final example, Roman Catholics can make a fixed payment in the form of a Mass stipend to a priest, who in turn conducts a Mass for the intention of the donor. See Hernandez, 490 U.S. at 709, 109 S.Ct. at 2153-54. Therefore, the court's conclusion that church services were not provided "in exchange for"

the debtors' tithing would fail to resolve the instances when religious contributions are directly linked to certain benefits.

The court's analysis may also prove too rigid in the sense that even when a religion does not expressly require a monetary contribution as a precondition to receiving a benefit, a practitioner may feel compelled to contribute to their religious organization in order to qualify for the services or to be a member in good standing. While a particular religion or church might not expressly require a contribution, many religious institutions would be incapable of providing services without contributions by their members. In some instances, therefore, but for their members' contributions, religious institutions might not be able to provide any services. For these reasons, the court's discussion of the "in exchange for" language may, in many instances, prove to be problematic and ill advised.

Finally, because the court's analysis assumes that the debtors received "reasonably equivalent value" for their contributions, it leaves unresolved whether religious services constitute "value" under the Bankruptcy Code. Clearly, the courts should refrain from placing a monetary value on the spiritual benefits gained from a certain religion. Our inability to assign a precise dollar amount to these benefits, however, does not mean that no value is received. In some situations it would not be difficult to attach a dollar figure to services provided by a church – e.g., calculating a tuition waiver (or credit) to parochial school given to contributing church members where non-members pay tuition. In other instances, contributors

receive services which have a value (e.g., counseling sessions, facility maintenance), but the bankruptcy trustee may not be able to meet its burden of establishing that the debtor contributed more than the reasonably equivalent value of those services because the trustee has difficulty attaching a monetary amount to the value of the services received. See In re Moses, 59 B.R. 815, 818 (Bankr.N.D.Ga.1986); Wilson v. Upreach Ministries, 24 B.R. 973, 979 (Bankr.N.D.Tex.1982). Therefore, situations exist in which a religious contribution by a bankruptcy debtor would not constitute a preferential transfer under the Bankruptcy Code. Because as I read it, the court's opinion does not foreclose such a conclusion, I specially concur in the court's decision to deny the bankruptcy trustee's petition for rehearing en banc.

In re Bruce YOUNG and Nancy Young, Debtors.

Julia A. CHRISTIANS, Trustee, Plaintiff,

v.

CRYSTAL EVANGELICAL FREE CHURCH, Bruce Young, and Nancy Young, Defendants.

Bankruptcy No. 4-92-871.
Civ. No. 4-93-76.
Adv. No. 4-92-157.

United States District Court,
D. Minnesota,
Fourth Division.

April 14, 1993.

Julia A. Christians, Lapp, Laurie, Libra, Abramson & Thomson, Minneapolis, MN, trustee.

Kenneth Corey-Edstrom, Henningson & Snoxell, Brooklyn Center, MN, for defendant Crystal Evangelical Free Church.

MEMORANDUM AND ORDER

MacLAUGHLIN, District Judge.

This matter is before the Court on defendant Crystal Evangelical Free Church's appeal of the bankruptcy court's[1] order granting summary judgment in favor of

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[1] The Honorable Chief Judge Robert J. Kressel, United States Bankruptcy Court for the District of Minnesota.

plaintiff Julia A. Christians, the trustee. The bankruptcy court's order will be affirmed.

FACTS

The parties stipulated to the following facts. Bruce and Nancy Young (debtors) filed a Chapter 7 bankruptcy petition on February 3, 1992. Plaintiff Julia A. Christians is the trustee in their case. In the year immediately preceding the debtors' filing, debtors contributed a total of $13,450 to defendant Crystal Evangelical Free Church. Debtors were insolvent at the time the contributions were made. In addition to their financial contributions, debtors held a variety of volunteer positions in the church. At no time did the church require debtors to pay any membership or attendance fee, but the church does teach that people should make regular financial contributions.

The trustee brought an adversary proceeding seeking to recover the contributions as "fraudulent transfers" within the meaning of the Bankruptcy Code. The trustee and the church both moved for summary judgment. The bankruptcy court granted the trustee's motion and denied the church's motion. *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886, 897 (Bankr.D.Minn.1992). The church appeals.

DISCUSSION

I. *Summary Judgment Standard*

The Court reviews de novo the bankruptcy court's grant of summary judgment. *McKee v. Federal Kemper Life Assur. Co.*, 927 F.2d 326, 328 (8th Cir.1991); *Steven v. Pike*

County Bank, 829 F.2d 693, 695 (8th Cir.1987). A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir.1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." *AgriStor Leasing*, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir.1987), *cert. denied*, 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

II. *Overview*

The parties raise several issues. Initially, the Court must determine whether, as a matter of statutory interpretation, the bankruptcy court correctly concluded that debtors did not receive "reasonably equivalent value in exchange for" the contributions. If the Court concludes that the bankruptcy court correctly interpreted the statute, the church requests that the Court analyze whether that interpretation of the statute violates the Free Exercise Clause or Establishment Clause of the Constitution. The constitutional analysis can be divided into three stages. First, the Court must decide whether to allow the church to raise constitutional arguments for the first time on appeal. Second, if the Court allows the church to raise those arguments, the Court must decide whether the church has standing to raise constitutional objections on behalf of debtors. Third, if the Court concludes that the church has standing, the Court must then address the merits of the church's constitutional arguments.

III. *Fraudulent Transfers Under the Bankruptcy Code*

A. *Applicable Law*

The first issue before the Court is whether the contributions to the church were avoidable transfers within section 548 of the Bankruptcy Code. Section 548 provides in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before

> the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> . . . .
>
> (2)(A) received less than a *reasonably equivalent value in exchange for* such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation. . . .

11 U.S.C. § 548(a) (emphasis added). For the Court to find that a fraudulent transfer occurred, the trustee must prove the following:

> 1. there was a transfer of an interest of the debtor in property;
>
> 2. the transfer was made within one year before the date of the filing of the petition;
>
> 3. the debtor was insolvent on the date the transfer was made; and
>
> 4. the debtor received less than a reasonable equivalent value in exchange for the transfer.

First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.), 110 B.R. 414, 417 (D.Minn.1990). The parties stipulated that the first three elements were satisfied; the only issue is whether the debtors received "reasonably equivalent value in exchange for" the contributions. *Christians*, 148 B.R. at 890.

In determining whether the debtors received reasonably equivalent value, the Court must examine all aspects

of the transaction and carefully measure the value of all benefits and burdens to the debtor, direct or indirect. *Pembroke Develop. Corp. v. Commonwealth Savings & Loan Assoc. (In re Pembroke Develop. Corp.)*, 124 B.R. 398, 400 (Bankr.S.D.Fla.1991). In other words, a determination of whether the debtor received reasonably equivalent value depends on the facts and circumstances of each case. *Minnesota Utility*, 110 B.R. at 419; *Joshua Slocum, Ltd. v. Boyle (In re Joshua Slocum, Ltd.)*, 103 B.R. 610, 618 (Bankr.E.D.Pa.), *aff'd*, 121 B.R. 442 (E.D.Pa.1989). The burden is on the trustee to establish that debtors did not receive reasonably equivalent value. *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 650 (3d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992); *Minnesota Utility*, 110 B.R. at 417-19.

The Court has previously addressed the issue of what constitutes reasonably equivalent value. In *Minnesota Utility*, a bank extended Minnesota Utility Contracting, a closely-held corporation, a revolving line of credit that was secured by assets of Minnesota Utility. Later, the bank agreed to extend additional credit to Minnesota Utility but only if another closely- held corporation, MUC Leasing, which was owned by the same shareholders that owned Minnesota Utility, granted the bank a security interest in its assets. Both Minnesota Utility and MUC Leasing filed for bankruptcy within one year of the extension of additional credit. The issue was whether MUC Leasing had received reasonably equivalent value for the security interest it granted the bank. The bankruptcy court held that indirect benefits, under certain circumstances, may constitute reasonably equivalent value but

that there was no evidence that MUC Leasing received any indirect benefits.

On appeal, the Court stated that "[i]n determining whether a debtor has received fair consideration for the transfer, the Court should consider the purpose of the requirement, which is to conserve the debtor's estate for the benefit of creditors." *Id.* at 420. The Court then held that while indirect benefits could constitute reasonably equivalent value under some circumstances, the benefits received must be "fairly concrete." *Id.* The Court affirmed the bankruptcy court's order because there was no evidence in the record that MUC Leasing received "fairly concrete" indirect benefits.

B. *The Bankruptcy Court's Order*

The bankruptcy court described the analysis as two-fold. Did the debtors receive "value?" If so, was that "value" given "in exchange for" the contributions? In addressing the question of whether debtors received "value," the bankruptcy court looked to the statutory definition of that term. For the purposes of section 548 –

> "value" means *property*, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.

11 U.S.C. § 548(d)(2)(A) (emphasis added). Because the church did not satisfy or secure a present or antecedent debt of the debtors in exchange for the donations, the bankruptcy court refined the inquiry to address whether

the debtors received "property" in return. 148 B.R. at 890-93.

Based on the following reasoning, the bankruptcy court held that the debtors did not receive "property." First, relying on dictionary definitions of the term "property," the bankruptcy court concluded that property consists of rights and things subject to ownership. *Id.* at 891. Second, based on this definition, the bankruptcy court rejected the church's argument that debtors received "property" in the form of religious services, theological programs, and access to the premises. *Id.* "The debtors did not receive legal or equitable rights nor did they obtain any ownership interest from their contributions." *Id.* Third, the bankruptcy court concluded that the contributions did not yield "value" because they were economically detrimental to the debtors' financial estate. *Id.* at 893. The bankruptcy court found that "it was the debtors individually and not their pre-petition financial estate or their post-petition bankruptcy estate that received any benefit." *Id.* Fourth, the bankruptcy court bolstered its conclusion that the church's services were not "property" by asserting that the Establishment Clause might prevent a court from placing a value on those services, a task the court would be required to perform to determine whether the value received was reasonably equivalent to the contributions. *Id.* at 894.

The bankruptcy court then assumed, arguendo, that the debtors did receive "value" from the services of the church. The bankruptcy court held that any "value" the debtors received was not "in exchange for" their contributions. *Id.* at 895. The bankruptcy court noted that the church welcomes all members to worship regardless of

the size of contribution. The court found that the services offered by the church were in no way linked to the debtors' contributions. The bankruptcy court also looked to the Internal Revenue Code for guidance. The court concluded that under the Internal Revenue Code payments made to a religious organization in exchange for a quid pro quo are not deductible. 26 U.S.C. § 170(c)(4); *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989). Finding that the church's argument that the debtors received services "in exchange for" the contributions called into question the right of all members to deduct donations, the bankruptcy court held that the same contribution that qualifies for a deduction under the Internal Revenue Code cannot also be "in exchange for" "value" under the terms of the Bankruptcy Code. 148 B.R. at 895.

Finally, the bankruptcy court was sharply critical of two cases finding that religious contributions were not avoidable under section 548. In *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr.N.D.Ga.1986), it was undisputed that the debtors had transferred $4,733.50 to their church in the year preceding the filing of their bankruptcy petition and the transfers took place while the debtors were insolvent. One of the debtors served as a deacon at the church and was required to tithe as a holder of that office. The trustee sought to recover the contributions as fraudulent transfers. The bankruptcy court found that the issue was solely one of statutory interpretation. The bankruptcy court recognized that in order for the services to constitute "value," the court first had to find that the services

constituted "property." The bankruptcy court held that the debtors received "property" based on the following reasoning. First, the bankruptcy court concluded that because the church required the contributions as a condition of one of the debtor's employment as a deacon, the contributions could be directly tied to the monetary compensation and benefits he received through his employment by the church. Second, the court found that the debtors received valuable services including marriage counseling and theological education. Third, the court found that the church provided heating, air conditioning, and electrical services for the debtors' comfort during the services they attended and those utility services could constitute exchangeable value. In the end, the bankruptcy court held that the trustee failed to meet his burden of proof because he did not offer adequate evidence that the debtors received less than a reasonably equivalent value in exchange for the contributions.

In reaching its decision in the case at bar, the bankruptcy court was very critical of the *Ellenberg* court. The bankruptcy court stated that *Ellenberg*'s conclusion that services provided by a church could constitute "property" violated the plain language of the statute. *Christians*, 148 B.R. at 896. The bankruptcy court also charged the *Ellenberg* court with neglecting to address the issue of whether the services provided by the church were "in exchange for" the contributions. *Id.* at 895-96. In short, the bankruptcy court concluded that the *Ellenberg* court ignored the statutory language in order to reach the "right" result. *Id.* at 896.

The bankruptcy court was also critical of a case on which the *Ellenberg* court relied. In *Wilson v. Upreach*

Ministries (In re Missionary Baptist Found. of Am.), 24 B.R. 973 (Bankr.N.D.Tex.1982), the debtor was the Missionary Baptist Foundation of America (MBFA), a nonprofit corporation which donated money to Upreach Ministries, another nonprofit corporation, within one year of MBFA filing for bankruptcy. There was no doubt that MBFA was insolvent at the time the contributions were made. After the bankruptcy court pointed out that a finding of fraudulent intent was not necessary, the court nevertheless felt it was relevant to highlight the fact that there were no "badges of fraud" in that case. The bankruptcy court held that whether the challenged transfer was for "reasonably equivalent value" was largely a question of fact and considerable latitude should be afforded to the finder of fact. The court concluded that "reasonably equivalent value" did not require that a monetary equivalent be received in exchange. The bankruptcy court held that the "good will" MBFA received in return for the contributions satisfied the "reasonably equivalent value" requirement and the contributions could not be recovered as fraudulent transfers.

In the instant case, the bankruptcy court criticized *Upreach Ministries* for the same reasons it criticized *Ellenberg*. The bankruptcy court stated that equating "good will" with intangible property which could provide "reasonably equivalent value" ignored the plain language of the Bankruptcy Code. *Christians*, 148 B.R. at 896. The bankruptcy court sympathized with the desire to do what "feel[s] right," but charged the *Upreach Ministries* court with willingly ignoring the statutory language in order to reach that result. *Id.*

C. *The Parties' Arguments*

The church argues that the bankruptcy court improperly construed section 548. The church begins by arguing that the bankruptcy court disregarded the canon of statutory interpretation that a statute should not be construed in a fashion that raises constitutional issues if another reasonable construction is available. The church asserts that Congress must clearly express an affirmative intention to regulate religious conduct before a statute should be interpreted in a way that interferes with the Establishment Clause and Free Exercise Clause of the First Amendment. The church argues that Congress did not intend section 548 to regulate religious conduct.

Next, the church argues that the bankruptcy court failed to consider the purpose of section 548. The church argues that the title of the statute, "Fraudulent transfers and obligations," indicates that Congress was concerned with unscrupulous creditors and not bona fide charities. The church asserts that because neither the church nor the debtors intended to defraud creditors, the purpose of section 548 does not apply in this case.

The church also argues that debtors received "value" in return for their contributions for several reasons. First, the church attempts to distinguish *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989), which held that any quid pro quo received in return for a contribution renders the contribution non-deductible, by asserting that the different purposes of the Internal Revenue Code and the Bankruptcy Code allow a finding that debtors

received "value" in return for their charitable contributions. Second, the church argues that a tax deduction for charitable contributions is "value" received for the purposes of the Bankruptcy Code. Third, the church claims that the spiritual counseling provided for debtors constituted "value." Fourth, the church argues that the debtors' donations allowed the church to pay operating expenses including electricity, heat, and air conditioning, and that debtors received "value" from those utilities while they were at the church. The church contends that there is no requirement in section 548 that the debtor be the only person to receive value or that others cannot enjoy benefits at the same time.

The church also objects to the bankruptcy court's conclusion that even if the debtors did receive "value," it was not "in exchange for" their donations. The church argues that the spiritual counseling, educational, and worship services were provided during the general time frame during which the donations were made and thus were "in exchange for" those services. The church also argues that the debtors received a tax deduction "in exchange for" the donations.

The trustee responds to most of the church's arguments by directing the Court's attention to the reasoning adopted by the bankruptcy court. In short, the trustee first argues that a finding that the debtors received "value" requires a finding that they received "property," and that debtors received no property in this case. Second, the trustee argues even if the debtors received "value," it was not "in exchange for" their contributions. Third, the trustee argues that a finding that the services provided by the church constituted "value" would force

the bankruptcy court into the impossible position of having to place a dollar value on those services in order to determine whether they were of "reasonably equivalent value" to the contributions. Finally, the trustee objects to the church's argument that a tax deduction was "value" received "in exchange for" the contributions on the grounds that the argument is being raised for the first time on appeal.

D. *Analysis*

The Court finds that the bankruptcy court adopted the proper analytical framework and interpreted section 548 correctly. There are two issues: (1) did the debtors receive "reasonably equivalent value" for their contributions, and if so (2) were the contributions given "in exchange for" that "value."

1. *Did Debtors Receive "Reasonably Equivalent Value"?*

The Court concludes that debtors did not receive "reasonably equivalent value," within the meaning of the Bankruptcy Code, for their contributions. "Value" is defined by the Bankruptcy Code. "Value" must be either "property, or satisfaction or securing of a present or antecedent debt." 11 U.S.C. § 548(d)(2)(A). The parties agree that the key issue is whether debtors received some sort of property right. The Court finds that they did not. Debtors stipulated that they could have taken advantage of the services offered by the church regardless of whether they made any financial contributions, but that the church encouraged regular donations. In other words,

debtors made the contributions out of a "sense of religious obligation." Appellant's Mem. at 13. A debtor cannot receive reasonably equivalent value for payments that are made out of a sense of moral obligation rather than legal obligation. *See Whitlock v. Hause (In re Hause)*, 13 B.R. 75, 79 (Bankr.D.Mass.1981). Moreover, emotional support received in exchange for a transfer, without more, cannot satisfy the requirement for reasonably equivalent value. *Walker v. Treadwell (Matter of Treadwell)*, 699 F.2d 1050, 1051 (11th Cir.1983). "The object of section 548 is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor's property." *Id.* Charitable contributions are clearly gratuitous transfers, despite the fact that debtors feel morally obligated to tithe. Strictly as a matter of statutory interpretation, there are no justifiable grounds to differentiate between religious donations and other gratuitous transfers, such as gifts to family members, which are clearly avoidable. *Walker*, 699 F.2d at 1051.

The Court concludes that the church's argument that the tax deduction debtors received for the contributions was "reasonably equivalent value" is also unpersuasive. The ability to deduct an amount of money from gross income cannot, in economic terms, be of "reasonably equivalent value" to that same amount in cash that has been removed from the estate. *See Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201, 203 (5th Cir.1980) (establishing rule that any transfer for less than 70 percent of market value of the property is per se not reasonably equivalent value).

Finally, the bankruptcy court was correct to look to Supreme Court precedent in connection with the Internal

Revenue Code for assistance. In *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989), the Supreme Court addressed the issue of whether fixed-level donations to a religious organization can be deducted from taxable income when specific services are provided by the religious organization in return for the fixed donation. The Court found that a quid pro quo analysis was appropriate. *Id.* 490 U.S. at 691, 109 S.Ct. at 2145. The Court held that a charitable contribution is deductible only if it is without adequate consideration. *Id.* 490 U.S. at 690, 109 S.Ct. at 2144. Given this ruling, by definition if a charitable contribution is deductible, *i.e.* without adequate consideration, it cannot be in exchange for "reasonably equivalent value." *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir.1981) (fair consideration for bankruptcy purposes is more than consideration needed to support a simple contract).

2. ***If Debtors Received "Reasonably Equivalent Value," Was It "In Exchange For" Contributions?***

Even if the debtors received "reasonably equivalent value," the Court finds that the church did not provide that value "in exchange for" the debtors' contributions. The parties stipulated that the church's support and services are available to all, regardless whether contributions are made. This stipulation precludes a finding that the church provided its services "in exchange for" debtors' contributions. The church's argument that debtors received a tax deduction "in exchange for" the

contributions is also unpersuasive. A charitable contribution is deductible only if there is no quid pro quo. *Hernandez*, 490 U.S. at 690, 109 S.Ct. at 2144. The Court declines to hold that although a tax deduction is not a quid pro quo for a donation, a tax deduction is given "in exchange for" a donation. *See Rubin*, 661 F.2d at 991.

3. *Other Case Law*

The Court agrees with the bankruptcy court's conclusion that the other cases addressing this issue have glossed-over the statutory requirements in order to reach the "right" result. In *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am.)*, 24 B.R. 973 (Bankr.N.D.Tex.1982), the bankruptcy court concluded that "reasonably equivalent value" did not require that a monetary equivalent be received in exchange. *Id.* at 979. The bankruptcy court held that the "good-will" received in return for the contributions satisfied the "reasonably equivalent value" requirement and the contributions could not be recovered as fraudulent transfers. *Id. Upreach Ministries* is inconsistent with this Court's precedent stating that the benefits received must be "fairly concrete." *First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.)*, 110 B.R. 414, 420 (D.Minn.1990). Moreover, the *Upreach Ministries* court did not discuss whether the contributions were given "in exchange for" the good-will it received. For these reasons, the Court declines to follow *Upreach Ministries*.

Turning to *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr.N.D.Ga.1986), while

the Court finds that this case's analysis suffers from many of the same flaws of *Upreach Ministries*, it is also distinguishable from the case at bar. In *Ellenberg*, the bankruptcy court premised its holding in part on the fact that the church required the contributions as a condition of one of the debtor's employment as a deacon and thus the contributions could be directly tied to the monetary compensation and benefits he received through his employment by the church. *Id.* In this case, the debtors have stipulated that they were not required to tithe. Accordingly, the Court concludes that debtors did not receive value in exchange for their contributions.

4. *Summary*

The church states that it is offended at the characterization of the transfers as "fraudulent." Unfortunately, that is the label the Bankruptcy Code places on transactions that harm the interests of creditors in general, and fraudulent intent is not required. *Ellenberg*, 59 B.R. at 819. While describing the donations as "avoidable transfers" rather than "fraudulent transfers" may be more appropriate because it lessens the inference of culpability, the purpose of section 548 is where attention should be focused. The avoiding powers of the Bankruptcy Code are designed to maximize the size of the estate in order to maximize the distribution to innocent creditors. *Minnesota Utility*, 110 B.R. at 417. The fact that debtors made gratuitous transfers to their church rather than to, for example, family members or some non-religious charity does not materially alter the analysis. In short, the Court concludes that, as a matter of statutory interpretation, debtors did not receive "reasonably equivalent value"

from the church's services and, even if the church's services constituted "reasonably equivalent value," the services were not provided "in exchange for" the debtors' $13,450 in donations.

IV. *Constitutional Issues*

The church argues that if the Court finds that the debtors' donations were avoidable transfers under section 548, applying section 548 in this case would violate the Free Exercise and Establishment Clauses of the Constitution. Before addressing the merits of those arguments, however, the Court must decide whether the church can raise constitutional issues for the first time on appeal and whether the church has standing to raise constitutional objections on behalf of the debtors.

A. *Issues Raised for the First Time on Appeal*

The church admits that it is seeking to raise constitutional arguments for the first time on appeal. Although the general rule is that an appellate court should not consider arguments not presented to the trial court, a blanket prohibition on new arguments is far too broad. *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir.1991). The appellate court has discretion in light of the facts and circumstances of a particular case to consider an issue for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). The Court should exercise this discretion carefully, however, and should consider whether the proper resolution is beyond any doubt, whether injustice might

otherwise result, or whether the argument involves a purely legal issue on which no additional evidence or argument would affect the outcome of the case. *Id.; Universal Title,* 942 F.2d at 1314-15.

The church argues that because the bankruptcy court noted in its opinion that constitutional questions may exist, the church should be allowed to argue this point on appeal. The trustee objects and asserts that the bankruptcy court's mention of potential constitutional questions was merely dicta and cannot provide the basis for the Court to disregard the general rule that issues cannot be raised for the first time on appeal.

The Court will exercise its discretion to consider the church's constitutional arguments because they involve purely legal issues on which no additional evidence would affect the outcome of the case. *Universal Title,* 942 F.2d at 1314-15. However, although the Court finds that the church is not procedurally barred from raising constitutional issues, the church must also establish that it has standing to raise constitutional issues.

B. ***Standing***

The trustee asserts that the church does not have standing to raise constitutional arguments because those claims must be brought by the debtors. The church relies on principles of third-party standing to overcome this objection.

The Supreme Court has held that standing rules differ depending on whether claims are based on the Free Exercise Clause or the Establishment Clause. Generally,

individuals must allege infringement on their own religious freedoms to bring a Free Exercise Clause claim. *McGowan v. Maryland*, 366 U.S. 420, 429, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961). There is an exception to the general rule which permits a litigant to raise the religious rights of third-parties if the third-parties cannot effectively assert those rights themselves. *Id.* at 430, 81 S.Ct. at 1107; *Corey v. City of Dallas*, 492 F.2d 496, 497 (5th Cir.1974). Standing under the Establishment Clause is broader than under the Free Exercise Clause because the Establishment Clause is designed to protect more than an individual's rights; it also protects society against "political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430, 81 S.Ct. at 1107.

The church clearly has standing to challenge the bankruptcy court's order to return the donations as a violation of the separation between church and state. However, a determination whether the church should be allowed to raise objections based on an alleged violation of debtors' free-exercise rights requires an analysis of whether debtors could effectively assert those rights themselves. *McGowan*, 366 U.S. at 430, 81 S.Ct. at 1107. The Court concludes that debtors cannot effectively assert those rights. The debtors' estate and the church are parties in this proceeding; the debtors are not directly involved. Thus, debtors cannot effectively assert their free exercise rights in this case. Moreover, there is no indication that debtors might be able to assert their free exercise rights in some other forum. Accordingly, the Court finds that the church has standing to raise both Establishment Clause and Free Exercise Clause issues.

C. Merits of the Constitutional Arguments

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. Am. I. The church presents several constitutional arguments which overlap in many respects. Generally, however, the church argues that the bankruptcy court's order violates the Free Exercise Clause and the Establishment Clause of the First Amendment.

1. *Free Exercise Clause*

The Free Exercise Clause prohibits governmental regulation of religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). However, "[n]ot all burdens on religion are unconstitutional." *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982). The government may regulate conduct or acts which have only an "incidental effect" on religion. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990). Thus, an individual cannot escape a valid and neutral law of general applicability by merely asserting that the law violates his or her religious beliefs. *Id.* 494 U.S. at 878-80, 110 S.Ct. at 1600-01. A law of general applicability may, however, violate the First Amendment if other constitutional protections, such as freedom of speech, are also at stake. *Id.* 494 U.S. at 880-82, 110 S.Ct. at 1601-02. Absent evidence that a law is designed to regulate religious conduct or beliefs, the law is presumed to be a neutral law of general applicability.

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir.1991).

The Supreme Court's decision in *Smith* "dramatically altered the manner in which we must evaluate free exercise complaints." *American Friends Service Cmte. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir.1991). The Third Circuit has described the change in free exercise doctrine as follows:

> Prior to [*Employment Division, Dept. of Human Resources of Oregon v.*] *Smith* [494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)], the case law of the inferior courts construing the free exercise jurisprudence of the Supreme Court consistently concluded that application of any statute to prohibit such a religious practice must be subjected to compelling scrutiny. This understanding was erroneous. . . . Indeed, the Court held that a criminal statute of general applicability not directed at religious practices is simply not subject to free exercise challenge. . . . [T]he rationale of the *Smith* opinion is not logically confined to cases involving criminal statutes.

Salvation Army v. New Jersey Dept. of Community Affairs, 919 F.2d 183, 194-95 (3d Cir.1990).

The church argues that the bankruptcy court's order violates the debtors' free exercise rights in several respects. First, the church asserts that the court's interpretation of the Bankruptcy Code results in discrimination against religion. The Code treats a variety of expenditures and property more favorably than other expenditures and property. For example, section 522 allows a debtor to exempt from property of the estate a residence, a motor vehicle, and a limited amount of

household goods and furnishings, among other things. 11 U.S.C. § 522(d). The church argues that it is unconstitutional to not include religious expenditures in the list of items accorded favorable treatment under the Code. The church emphasizes the strength of the debtors' religious beliefs and argues that the principle of tithing is as much a matter of necessity as expenditures for food or clothing, expenditures that the Bankruptcy Code permits as part of a Chapter 13 plan. In short, the church argues that the "Free Exercise Clause mandates that tithes made to a church out of a sense of religious obligation or requirement be treated in the same manner as the many other items that are treated by the Code as exempt property or permitted personal expenditures." Appellant's Mem. at 13. In support of this argument, the church cites several cases which have held that confirmation of a Chapter 13 plan which provides for regular religious donations does not violate the Constitution. *In re McDaniel,* 126 B.R. 782, 784-85 (Bankr.D.Minn.1991) (per se prohibition on religious contributions as reasonably necessary expense would violate free exercise rights, but prohibition on excessive donations does not); *In re Bien,* 95 B.R. 281, 283 (Bankr.D.Conn.1989) (non-discretionary tithing constituted reasonably necessary expenditure and included in plan); *In re Navarro,* 83 B.R. 348 (Bankr.E.D.Pa.1988) (confirmation of plan which included tithing would not force creditor to support religious views in violation of the Establishment Clause); *In re Green,* 73 B.R. 893 (Bankr.W.D.Mich.1987), *aff'd,* 103 B.R. 852 (W.D.Mich.1988) (plan which provides for tithing does not violate the Establishment Clause; in fact, denial of

confirmation solely because it included tithing would violate Free Exercise Clause).

Second, the church argues that the bankruptcy court's order violates debtors' rights to freely exercise their religion. The church asserts that the Supreme Court's decision in *Smith* does not apply to the case at bar. The church argues that the Bankruptcy Code is not a neutral law of general applicability because it contains many provisions which call for courts to make decisions based on the particular facts and circumstances of a case. Thus, the church asserts, the trustee must establish that the return of the contributions will serve a compelling state interest that cannot be achieved through less restrictive means. *See Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The church argues that enlarging the pool of funds from which creditors may make claims cannot be deemed a compelling governmental interest. The church asserts that the fact that the Bankruptcy Code exempts certain property from the estate and allows certain necessary expenditures establishes that maximizing the funds available to creditors is not a compelling governmental interest.

Third, the church argues that the bankruptcy court's order violates debtors' "hybrid" free exercise/free speech rights to support their religion. In *Smith,* the Supreme Court left the door open for challenges to neutral laws of general applicability when the laws impact not only the free exercise of religion, but some other constitutional protection as well. The church argues that through their contributions the debtors were supporting the dissemination of a particular message protected by the Free Speech Clause. The church asserts that this "hybrid" free speech/

freedom of religion argument must be analyzed under the compelling interest and less restrictive means test. The church contends that the trustee cannot satisfy this test.

The trustee directly responds to each of the church's arguments. First, the trustee argues that section 548 is a neutral statute of general applicability. The trustee points out that section 548 applies to "any transfer." The trustee also argues that it is inappropriate to compare section 522, which exempts certain property from the estate, and section 1325, which provides for certain expenditures that are reasonably necessary for maintenance and support, with section 548, which governs fraudulent transfers. The trustee argues that these statutory provisions serve distinct purposes and that these distinct purposes explain why different results may occur under each provision. Moreover, the trustee argues, different results under different Code provisions is not equivalent to disparate treatment on the basis of religion. Second, the trustee argues that because this dispute involves a neutral statute of general applicability, the Supreme Court's holding in *Smith* requires a finding that the Free Exercise Clause has not been violated. The trustee asserts that the infringement on religious freedom in this case is merely an "incidental effect" of this neutral statute. Finally, the trustee asks the Court to reject the church's "hybrid" free speech/free exercise claim. The trustee argues that the cases cited by the Supreme Court in describing such a claim were all decided on the basis of free speech principles. The trustee asserts that this case does not involve substantial free speech elements and the *Smith* analysis controls.

The Court concludes that section 548 is a neutral statute of general applicability. There is no evidence in the statutory text or otherwise that section 548 was designed to regulate religious beliefs or conduct. Thus, section 548 is presumed to be a neutral law of general applicability. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir.1991). The issue is whether section 548 has more than an "incidental effect" on religion. *Smith*, 494 U.S. at 878, 110 S.Ct. at 1600. The Court finds that it does not. The purpose of the statute is to enlarge the pool of funds for creditors by recovering gratuitous transfers made on the eve of bankruptcy by insolvent debtors. *First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.)*, 110 B.R. 414, 417 (D.Minn.1990). There is no evidence that in achieving this purpose section 548 has had any more than an "incidental effect" on religion. A variety of other laws, federal and state, clearly apply to religious organizations and its members, *see, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (suit brought to enforce Internal Revenue Code); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security); *South Ridge Baptist Church v. Industrial Comm. of Ohio*, 911 F.2d 1203 (6th Cir.1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991) (workers' compensation); *E.E.O.C. v. Tree of Life Christian Schools*, 751 F.Supp. 700 (S.D.Ohio 1990) (Equal Pay Act); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert. denied*, 498 U.S. 846, 111 S.Ct. 131, 112 L.Ed.2d 99 (1991) (minimum wage laws), and the Court finds that the Bankruptcy Code is no different. In short, because section 548 is a neutral law of general

applicability, and because the statute has only an "incidental effect" on religion, the church's free exercise challenge fails. *Salvation Army v. New Jersey Dept. of Community Affairs*, 919 F.2d 183, 194-95 (3d Cir.1990).

Even if *Smith* did not apply in this case, the Court is satisfied that the Bankruptcy Code is designed to advance a compelling government interest. *See, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (Internal Revenue Code serves compelling governmental interest); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security). The government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling interest. Again, however, this is of limited relevance because Smith does not require the finding of a compelling interest.

The Court also finds unpersuasive the church's argument that section 548 unfairly discriminates against religious contributions. The church asks the Court to find unfair discrimination based on the fact that section 522 exempts a variety of property, but not religious donations, from the property of the estate and the fact that several courts have allowed religious donations to be made under the terms of a Chapter 13 plan. The Court cannot accept this argument because the requirements and purposes of these provisions are different. Section 522 allows a debtor to exempt some property from the estate in order to allow the debtor to get a fresh start. *Johnson v. Ford Motor Credit Co. (In re Johnson)*, 57 B.R. 635, 639 (Bankr.N.D.Ill.1986). Courts allowing tithing under the terms of a Chapter 13 plan have found it to be "reasonably necessary . . . for the maintenance or support

of the debtor." 11 U.S.C. § 1325(b)(2). By contrast, section 548 calls for a determination whether "reasonably equivalent value" was received "in exchange for" the contributions. The different purposes of these statutory provisions make clear that the Bankruptcy Code tries to treat both debtors and creditors fairly. It does not establish that section 548 unfairly discriminates against religion.

Finally, the Court is unpersuaded by the church's argument that their contributions were for the support of the dissemination of a particular message and thus their free speech rights have been violated. A limitation on the amount that a person may contribute to a cause "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley v. Vako,* 424 U.S. 1, 20-21, 96 S.Ct. 612, 635, 46 L.Ed.2d 659 (1976) (per curiam). Contributions are symbolic acts of support, rather than expository acts of advocacy. *Id.* at 21, 96 S.Ct. at 635. Moreover, even if section 548 has the effect of regulating speech, a content-neutral law is constitutional if it is narrowly tailored to serve a significant governmental interest and leaves open alternative channels of communication. *Ward v. Rock Against Racism,* 491 U.S. 781, 796-97, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989). As the Court stated earlier, section 548 is designed to serve a significant governmental interest – maximizing the amount creditors are able to recover. Alternative channels of communication are also available. Debtors remain able to support the message of the church in a variety of ways. A limitation on the amount a person may contribute to an organization does not infringe on the contributor's freedom to discuss the particular message of that organization. *Buckley,* 424 U.S. at 21, 96 S.Ct. at 635.

In short, the Court holds that an order for the church to turn over debtors' contributions, which were made while the debtors were insolvent, does not violate debtors' free exercise or free speech rights.

2. *The Establishment Clause*

A statute or governmental action will not violate the Establishment Clause if it can pass a three-pronged test: (1) it must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

The church argues that, in addition to burdening debtors' free exercise rights, the bankruptcy court's order violates the church's rights by interfering in the autonomy of the church and entangling government in the operations and activities of the church. The church argues that if the bankruptcy court's order is affirmed, the church will constantly be concerned that courts will seize contributions made by members and thus the church will constantly be concerned about its financial stability. The trustee responds by arguing that Establishment Clause concerns are wholly lacking in this case. The trustee asserts that an Establishment Clause claim would arise only if the Court accepted the church's arguments and granted special treatment under section 548.

The Court concludes that the bankruptcy court's interpretation of section 548 does not violate the Establishment Clause. First, section 548 has a secular purpose –

to maximize the size of the estate. The provision is neutral in both design and purpose. *See Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 2147, 104 L.Ed.2d 766 (1989). Second, the primary effect of section 548 is neither to advance nor inhibit religion. The mere fact that the government brings suit to enforce a religious entity's compliance with a statute does not elevate the primary effect of the statute to one that inhibits religion. *See, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (suit brought to enforce Internal Revenue Code); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security). Third, section 548 does not threaten excessive entanglement between church and state. The routine enforcement of statutes which involves no inquiries into religious doctrine does not violate the nonentanglement command. *Hernandez*, 490 U.S. at 695, 109 S.Ct. at 2147. Moreover, the fact that the government is forcing the church to disburse funds does not result in excessive entanglement. *Jimmy Swaggert Ministries v. Bd. of Equalization*, 493 U.S. 378, 393, 110 S.Ct. 688, 698, 107 L.Ed.2d 796 (1990); *South Ridge Baptist Church v. Industrial Comm. of Ohio*, 911 F.2d 1203, 1210-11 (6th Cir.1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991). Finally, the Court agrees with the bankruptcy court's opinion that a ruling in favor of the church could lead to Establishment Clause problems. If the Court held that the debtors received "value" "in exchange for" their contributions, the next issue would be to quantify that "value" to determine if it was "reasonably equivalent" to the amount of the contributions. Such a subjective inquiry could be "fraught with the sort of entanglement that the Constitution forbids."

Lemon v. Kurtzman, 403 U.S. 602, 620, 91 S.Ct. 2105, 2115, 29 L.Ed.2d 745 (1971).

In short, the Court holds that an order for the church to turn over debtors' contributions does not violate the Establishment Clause.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that the order of the bankruptcy court is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

In re Bruce YOUNG and Nancy Young, Debtors.

Julia A. CHRISTIANS, Trustee, Plaintiff

v.

CRYSTAL EVANGELICAL FREE CHURCH, Defendant.

Bankruptcy No. 4-92-0871.
Adv. No. 4-92-157.

United States Bankruptcy Court,
D. Minnesota.

Dec. 17, 1992.

Julia A. Christians, Lapp, Laurie, Libra, Abramson & Thomson, Chartered, Minneapolis, Minn., for plaintiff.

Tony Mannella, Babcock, Locher, Neilson & Mannella, Anoka, Minn., for defendant.

ROBERT J. KRESSEL, Chief Judge.

This adversary proceeding came on for hearing on October 7, 1992, on the parties' cross-motions for summary judgment. Julia A. Christians, the plaintiff, appeared *in propria persona* and F. Anthony Mannella appeared on behalf of the defendant. This court has jurisdiction pursuant to 28 U.S.C. §§ 1134 and 157(a) and Local Rule 201. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(H).

UNDISPUTED FACTS

The parties have stipulated to certain facts for purposes of this motion. On February 3, 1992, Bruce Young and Nancy Young filed a joint chapter 7 petition. The

plaintiff is the trustee in their case. In the year immediately preceding the debtors' filing, the debtors made contributions to Crystal Evangelical Free Church. These contributions totaled $13,450 and were made while the debtors were insolvent.[1]

The debtors were active church members. As a supplement to their tithing, the debtors held numerous positions in the church and had served as officers of the day. The debtors regularly attended church services, actively participated in the church's programs and were welcomed on the premises at any time. These accommodations where [sic] available to the debtors whether they financially supported the church or not. At no time did the church require the debtors to pay any membership or attendance fee. However, the church does teach that people should offer regular contributions to the church. The debtors respected those teachings and made several purely voluntary contributions. However, the debtors did not receive money or tangible property in exchange for their contributions.

The plaintiff brought this adversary proceeding seeking to avoid the contributions pursuant to 11 U.S.C. § 548(a)(2) and recover them pursuant to 11 U.S.C. § 550(a). The plaintiff and the defendant both moved for summary judgment.

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[1] The defendant stipulated to the debtors' insolvency for purposes of this motion only.

ISSUE

The issue is whether contributions, made by a [sic] insolvent debtor to their church during the year preceding the filing of a chapter 7 petition, are avoidable under § 548(a)(2)[2]? I conclude that they are.

DISCUSSION

I.

The Standard For Summary Judgment[3]

Summary judgment plays a very important role allowing the judge to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes to Rule 56. The importance of summary judgment cannot be overemphasized. Indeed, "[s]ummary judgment . . . is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d

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[2] § 548 is entitled "Fraudulent Transfers and Obligations." The implication is unfortunate. While § 548(a)(1) specifically deals with transfers that are fraudulent, fraud is not a requirement for avoidability under § 548(a)(2).

[3] *See generally*, William W. Schwarzer, Allan Hirsch, David J. Barrans, *The Analysis and Decision of Summary Judgment Motions; A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441 (1992); George Loewenstien, *Second Thoughts about Summary Judgment*, 100 Yale L.J. 73 (1990); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgment*, 45 U.Chi.L.Rev. 72 (1977).

265 (1986) (quoting Rule 1 of the Federal Rules of Civil Procedure). "The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op., Inc.*, 838 F.2d 268, 273 (8th Cir.1988); *see Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 189-90 (D.C.Cir.1985) (Bork, J., dissenting).[4]

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).[5]"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

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[4] Judge Bork's comments were later adopted by the United States Supreme Court. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[5] Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, "Rule 56 Fed.R.Civ.P. applies in adversary proceeding[s]." *See* Fed.R.Bankr.P. 7056.

A. *The Burdens*

1. *The Moving Party*

Initially, the burden is on the party seeking summary judgment. It is the moving party's job to inform the court of the basis for the motion, and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Simply stated, the moving party must show the court that there is an absence of evidence to substantiate the non-moving party's case. *Id.* at 325, 106 S.Ct. at 2554. To that end, the movant discharges its burden by asserting that the record does not contain a triable issue and identifying that part of the record which supports the moving party's assertion. *See Id.* at 323, 106 S.Ct. at 2552; *City of Mt. Pleasant*, 838 F.2d at 273.

2. *The Non-moving Party*

Once the movant has made its showing, the burden of production shifts to the non-moving party. The non-moving party must "go beyond the pleadings and by [its] . . . own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' " establish that there is specific and genuine issues of material fact warranting a trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(c)). The non-moving party cannot cast some metaphysical doubt on the moving party's assertion. *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d

538 (1986). The non-moving party must present specific significant probative evidence supporting its case, *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir.1990) sufficient enough "to require a . . . judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). Any affidavits must "be made on *personal* knowledge, must set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e) (emphasis added). If, however, the evidence tendered is "merely colorable," or is "not significantly probative," the non-moving party has not carried its burden and the court must grant summary judgment to the moving party. *Id.* 477 U.S. at 249-50, 106 S.Ct. at 2511.

Here, however, the parties have stipulated to all the genuine issues of material fact and have not proffered any additional evidence. Accordingly, judgment may be entered as a matter of law.

II.

Church Contributions as Avoidable Transfers

The trustee asserts that the contributions to the church were avoidable transfers within 11 U.S.C. § 548(a)(2). Section 548, in relevant part, provides:

> Fraudulent transfers and obligations.
>
> (a) The trustee may avoid any transfer of an interest of the debtor in property . . . that was

> made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> . . . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer
>
> . . . . .

11 U.S.C. § 548. Thus, to avoid the transfer, the trustee must prove that:

(1) there was a transfer of the debtors' interest in property;

(2) made on or within a year preceding the filing of the petition;

(3) while the debtors were insolvent; and

(4) the debtors received less than reasonably equivalent value in exchange for the transfer.

First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.), 110 B.R. 414, 417 (D.Minn.1990) *aff'g* 101 B.R. 72 (Bankr.D.Minn.1989). The parties have stipulated to the first three elements. Thus these motions boil down to one question: Did the debtors receive reasonably equivalent value in exchange for their contributions? The question really has two

parts.[6] First, did the debtors receive value from the church? Second, if the debtors did receive value was it in exchange for their contributions?

A. *Did the Debtors Receive Value?*

The task of resolving the dispute over the meaning of "value" begins with the language of the statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588 (1990) ("the fundamental canon [of] statutory interpretation begins with the language of the statute itself."); *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "[My] sole function . . . is to enforce [the statute] according to its terms." *Id.*, 489 U.S. at 241, 109 S.Ct. at 1030 (citing *Caminetti v. U.S.*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)). Defining the terms of the statute, I must "presume that a legislature says in a statute what it means and means in a statute what it says . . . " *Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, ___, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) giving effect to the Code's plain meaning. *See, e.g., Patterson v. Shumate*, ___ U.S. ___, ___-___, 112 S.Ct. 2242, 2248-51, 119 L.Ed.2d 519 (1992); Germain, ___ U.S. at ___- ___, 112 S.Ct. at 1149-50; *U.S. v. Nordic Village, Inc.*, ___ U.S. ___, ___, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992); *Union Bank v. Wolas*, ___ U.S. ___, ___, 112 S.Ct. 527, 530, 116 L.Ed.2d 514 (1991); *Board of Governors v.*

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[6] While there is obvious overlap, the two parts require independent analysis. This, unfortunately is consistently ignored by virtually all the reported case law discussing section 548.

MCorp Financial, Inc., ___ U.S. ___, ___-___, 112 S.Ct. 459, 465-66, 116 L.Ed.2d 358 (1991).

> Turning to section 548, "value" is
>
> property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.

11 U.S.C. § 548(d)(2)(A). The church did not satisfy or secure a present or antecedent debt of the debtors. Thus, the inquiry becomes: Did the debtors receive "property"?

1. *What is "Property?"*

While the Bankruptcy Code does not specifically define "property", various dictionaries do. For instance *Blacks Law Dictionary* defines property as

> that which belongs exclusively to one . . . every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. . . .
>
> The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.

Black's Law Dictionary, 1095 (5th ed. 1979). Parsing through the definition, one realizes that rights and things subject to

ownership are property. Things are "whatever may be possessed or owned or be the object of a right. . . . " *Webster's Third New International Dictionary,* 2376 (1981). Ownership is

> . . . [t]he right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to some one in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal. . . .

Black's Law Dictionary, 997 (5th ed. 1979). Rights are established by the

> power or privilege vested in a person by the law to demand action or forbearance at the hands of another: a legally enforceable claim against another that the other will do or will not do a given act . . . the capacity to assert a legally recognized claim. . . .

Webster's Third New International Dictionary, 1955 (1981).

The church asserts that the debtors received property in the form of religious services, theological programs and access to the premises. However, I find this argument unpersuasive. The debtors did not receive legal or equitable rights nor did they obtain any ownership interest from their contributions.

The debtors did not receive an ownership interest in the church or anything else by making their contributions. It is hard to imagine, at least in a mortal sense, that religious services and the like, can be possessed, owned or enjoyed to the exclusion of others. Indeed, the church traditionally is a place shared by all and where all are welcome. In fact, at one time the church was the center of the community tantamount to a town hall. That being the

case, the debtors could not have received an ownership interest in anything from their contributions.

2. *Can Executory Promises Be "Property?"*

Nor did the debtors receive any legal or equitable right to the services[7] the church provided. Since the middle of sixteenth century, executory promises have given rise to legal and or equitable rights. *See* Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum.L.Rev. 35, 102 (1983) (citing *Rogers v. Snow, Danlison*, 123 Eng.Rep. 301 (C.P.1572)). Executory promises are bargained for exchanges in which one party owes, in a contractual sense, performance to another in the future. If either party fails to perform, a breach may be declared and the innocent party may assert legal or equitable rights. These rights arising under executory

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[7] While not receiving property, the debtors, before and after making their contributions, did receive services. Services are "act[s] done for the benefit . . . of another." *Webster's Third New International Dictionary*, 2075 (1981). The debtors plainly benefited from acts performed by the church. The debtors enjoyed their association with the Church and regularly attended church services and functions. Attending these services and functions, the debtors were comforted by the theologians unreserved advice, teachings, warmth and gospel. This spiritual comfort, I suspect, is what the debtors sought and what the church offered through its actions. Simply, the church acted, whether directly or indirectly, for the benefit of the debtors who received services. This, however, does not answer the question of whether the debtors had a *right* to such services.

promises yield "value."[8] *Schlecht v. Schlecht*, 168 Minn. 168, 209 N.W. 883, 886 (1926) (assignment of interest in a contract in exchange for labor and materials to be furnished in the future was for value); *Freitag v. The Strand of Atlantic City*, 205 F.2d 778, 784 (3rd Cir.1953) (executory promises may be very valuable); *Hummel v. Cernocky*, 161 F.2d 685, 686 (7th Cir.1947) (transfer of property to son who took over the mortgage was for value); *Chagnon Lumber Co. v. DeMulder*, 121 N.H. 173, 427 A.2d 48, 50 (1981) (citing *Osgood v. Insurance Co.*, 93 N.H. 160, 37 A.2d 12, 13 (1944)) (conveyance by husband of his interest in house in exchange for wife's promise to obtain second mortgage loan and use money to satisfy husband's debts

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[8] While there are numerous cases opining that the Code's definition of value leaves "no room for a mere executory promise from the transferee as constituting that value", those cases are, in my opinion, incorrectly decided. Indeed, many of the cases rest on the Uniform Fraudulent Conveyance Act which has been subsequently modified. Those modifications are found in the Uniform Fraudulent Transfers Act which specifically provides that executory promises are "value." *See* Uniform Fraudulent Transfers Act § 3, 7A U.L.A. 651-52 (1992) comment 4. Moreover, some courts are plainly confused. A good example of this confusion is *Gray v. Snyder (In re Gray)*, 704 F.2d 709 (4th Cir.1983). The *Gray* court cites *Collier on Bankruptcy* for the proposition that reasonably equivalent value under § 548 excludes future consideration, at least to the extent not actually performed. *Id.* at 711. Then, one paragraph later the *Gray* court essentially finds that a transfer of debtor's interest in home in exchange for future alimony is value. *Id.* at 712. The court, however, mischaracterizes the alimony as a "present or antecedent debt." *Id.* Plainly, the obligation to pay alimony is an executory promise. This mischaracterization, as well as the court's determination, are just a sample of the confusion among courts over the issue of executory promises.

was for value); *In re Fair,* 142 B.R. 628, 631 (Bankr.E.D.N.Y.1992) (transfer benefitting daughter and wife as part of a bargained for separation agreement and divorce whereby ex-wife agreed to forego any claim for maintenance in return for the conveyance, is a transfer for fair consideration); *In re Cottrill,* 118 B.R. 535, 537 (Bankr.S.D.Ohio 1990) (transfer by debtor to increase retirement payments is a transfer for value); *see also Quinn v. Union Nat'l Bank,* 32 F.2d 762, 771 (8th Cir.1929) (executory promises are value if unconditionally performed in the future). *Cf. In re Tveten,* 402 N.W.2d 551, 556 (Minn.1987) (character of the property received is not considered when determining "value.").

In addition to the case law, the Code itself recognizes some executory promises as value. While not directly applicable, section 541 is telling of what Congress meant when it said "property." Foremost, Congress intended that property be defined broadly. H.R.Rep. No. 595, 95th Cong. 1st Sess. 367-368 (1977); S.Rep. 989, 95th Cong., 2d Sess. 82-83 (1978) U.S.Code Cong. & Admin.News p. 5787. "Property" is all encompassing. *Id.* This broad and all encompassing definition clearly includes executory promises. The plain language of section 548 supports my point. As previously stated, executory promises give rise to rights which are themselves considered a "legal or equitable interest of the debtor in property." 11 U.S.C. § 541(a)(1). For example: If prior to bankruptcy, a debtor had paid in advance to have his lawn mowed, no one would doubt that the debtor had the "right" to have his lawn mowed and that right was property of the estate under § 541(a)(1).

This broad, all encompassing definition of property is reflected and carried over into section 548. That becomes apparent focusing on the operative language of the statute. The plain language of section 548(d)(2)(A) tells me that the whole world of property is value less one specific exception, the "unperformed promise to furnish support to the debtor or a relative of the debtor." 11 U.S.C. § 548(d)(2)(A). The negative implication of this specific exclusion is that "property" includes any other kind of enforceable executory promise. *See* 2 David E. Epstein, Steve H. Nickles, James J. White, Bankruptcy, § 6-49, p. 21 (1992). Any other reading of section 548(d)(2)(A) does not give credence to the Code's plain meaning.

Further support is found in the comments to section 3 of the Uniformed Fraudulent Transfer Act (UFTA).[9] Indeed, the drafters of the UFTA made it clear that value includes executory promises:

> [T]he Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. Courts construing . . . prior law nevertheless have *held unperformed promises to constitute value in a variety of circumstances*. . . .

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[9] The Uniform Fraudulent Transfers Act is the successor to the Uniform Fraudulent Conveyance Act. One of the key changes in the UFTA was the discarding of the concept of "fair consideration" in favor of the Bankruptcy Codes "reasonably equivalent value" defining "value" as the Code does. *See* Uniform Fraudulent Transfers Act, 7A U.L.A. 651 comment 3; Minn.Stat. § 513.43 (1992) (adopting and codifying as state law the Uniform Fraudulent Transfers Act); *see generally*, Peter A. Alces & Luther M. Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U.Ill.L.Rev. 527, 539-543 (1985).

> On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. *This Act [defining "value"] adopts the view that [executory promises are value].*

Uniform Fraudulent Transfers Act § 3, 7A U.L.A. 651-52 (1992) comment 4 (emphasis added). Plainly, the drafters intended to include most executory promises within the definition of value. Thus, precedent, the Code and the UFTA leave but one conclusion; executory promises constitute value.

3. *Did the Church Make Any Executory Promises?*

In addition to yielding value, executory promises also share another common characteristic; consideration. E. Allan Farnsworth, *Farnsworth on Contracts* §§ 2.3-2.4 (1990) (citing *Restatement (Second) of Contracts* § 75; Arthur Corbin, *Contracts* § 143 (1963)); *see generally*, Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum.L.Rev. 35, 102 (1983) (historical foundations of executory promises). Thus, in order for an executory promise to give rise to legal and equitable rights, it must be supported by consideration. Here, however, the church's performance of worship and other services was not supported by consideration. Foremost, the church's performance of worship was not implicitly or explicitly "promised" to the debtors. In fact, the debtors' contributions did not induce the church to perform in any way. There was no link between what the debtor gave or promised to give and the church's behavior. The church

performed unsolicited and independent of the debtors' contributions and in no way did the church change it's position in reliance on the debtors continuing to support the church. *See generally,* E. Allan Farnsworth, *Farnsworth on Contracts* §§ 2.6, 2.9 & 2.10 (1990) (discussing the bargain theory of consideration).

Moreover, the debtors made their contributions receiving unbargained for benefits; the privilege to participate in religious worship. While this worship may have yielded the feelings of association, comfort, affection, companionship and love, these subjectively emotional benefits cannot be bargained for. *See Walker v. Treadwell (In re Treadwell),* 699 F.2d 1050, 1051 (11th Cir.1983) (citation omitted); *In re Porter,* 37 B.R. 56, 60-61 (Bankr.E.D.Va.1984). Thus, any benefits received by the debtors were mere gratuities lacking consideration and deemed valueless. *Id.; see also In re Royal Coach Country, Inc.,* 125 B.R. 668, 673 (Bankr.M.D.Fla.1991); *In re Uhlmeyer,* 67 B.R. 977, 980 (Bankr.D.Ariz.1986); *In re Factory Tire Distribs., Inc.,* 64 B.R. 335, 339 (Bankr.W.D.Pa.1986).

Beyond there being no consideration for the exchange, the charitable contributions were not economically beneficial to the debtor. It is fundamental that the transfer be economically beneficial to the debtor's estate for it to yield "value." *Rubin v. Mfrs. Hanover Trust Co.,* 661 F.2d 979, 993 (2d Cir.1981); *Ransier v. Public Employees Retirement System (In re Cottrill),* 118 B.R. 535, 537 (Bankr.S.D.Ohio 1990) (under § 548(a)(2), it is necessary to show lack of an economic benefit); *Ohio Corrugating Company v. DPAC, Inc. (In re Ohio Corrugating Co.),* 91 B.R.

430, 436 (Bankr.N.D.Ohio 1988) (debtor must receive economic value); *Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.)*, 100 B.R. 127, 136 (Bankr.D.Mass.1989) (unlike consideration, there must be some measurable economic benefit). The debtors' estate did not obtain any economic value from the church. First, it was the debtors individually and not their pre-petition financial estate or their post-petition bankruptcy estate that received any benefit.[10] Indeed, both estates could not and did not participate in the religious worship. Second, any benefit received by anyone lacked tangible or recognizable economic benefit.[11] Instead, the debtors had the opportunity to participate in religious worship; an item without a marketable financial value or economic utility from a creditor's view. Strictly religious benefits are not

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[10] Any benefit that the debtors may have received, however, was merely incidental. Rev.Rul. 71-580, 1971-2 C.B. 235, 236 ("Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to the members of the faith, with the private benefit to individual participants being merely incidental to the broader good that is served."). "The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship . . . or whether donations are voluntary or fixed." *Staples v. C.I.R.*, 821 F.2d 1324, 1326 (8th Cir.1987) *vacated*, 490 U.S. 1103, 109 S.Ct. 3271, 104 L.Ed.2d 1014 (1989) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

[11] At best, the debtor received "psychic income." Psychic income recognizes that in some sense, no one acts unless action is preferable to inaction and takes into consideration the emotional benefits such as public acclaim, reputation for righteousness or internal pleasure derived from economically unwise decisions.

economically valuable. *See Hernandez v. C.I.R.*, 490 U.S. 680, 690-95, 109 S.Ct. 2136, 2144-46, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989) (distinguishing contributions to Church of Scientology from other contributions to religious organizations for purpose of Tax Code § 170 deductibility); *Staples v. C.I.R.*, 821 F.2d 1324, 1326-27 (8th Cir.1987) *vacated*, 490 U.S. 1103, 109 S.Ct. 3271, 104 L.Ed.2d 1014 (1989) (Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm.); *Neher v. C.I.R.*, 852 F.2d 848, 851-57 (1988) *vacated* 882 F.2d 217 (6th Cir.1989); *Christiansen v. C.I.R.*, 843 F.2d 418, 420-21 (10th Cir.1988) *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1035 (1989).

4. *Can a Value Be Put on Church Services?*

There are other problems with treating church services as property. As previously discussed, executory promises give rise to rights which are enforceable in law and equity. Assuming the debtors' contributions gave rise to valuable enforceable executory promises, how am I or any other judge to enforce them. First, it is nearly impossible to assess damages compensating the debtors for their lost bargain; there is no quantifiable certainty to the calculation. Contributions are not mandatory and amounts are not prescribed; every member contributes a different amount. It is also highly probable that each of the members values their spiritual experience differently if the experience can be valued at all. *See Staples*, 821 F.2d at 1327 ("Spiritual gain to an individual church member cannot be valued by any measure known in the secular

realm.") Simply, there is no objectively or subjectively reasonable way to put the plaintiff in as good a position as if the promise had been honored.[12]

In addition, enforcement of executory promises between the church and its members either by an award of damages or its alternative of specific performance, might raise First Amendment problems. Enforcement puts the court in the delicate position of not only differentiating between "religious" benefits and "secular" ones but also putting a value on those benefits. While I only raise this as a fear, this is the sort of inquiry which I believe is "fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 620, 91 S.Ct. 2105, 2115, 29 L.Ed.2d 745 (1971); *see id.* at 621-22, 91 S.Ct. at 2115-16; *see generally Hernandez*, 490 U.S. at 693-99, 109 S.Ct. at 2146-48.[13] Thus, there being no way to enforce or compensate the debtors for their contributions, I am left with one conclusion; charitable contributions cannot give rise to an enforceable executory promise.

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[12] It is fundamental that one of the main objectives contract remedies is to put the injured party in as good a position as that party would have been had the contract been performed. *See* E. Allan Farnsworth, *Farnsworth on Contracts*, § 12.1 at 147-48 (1990).

[13] See footnote 17 *infra* and text; *see generally* Note, *Section 170, Tax Expenditures and the First Amendment: The Failure of Charitable Religious Contribution for the Return of a Religious Benefit*, 61 Temp.L.Q. 443 (1988) (discussing general constitutional problems associated with section 170 deduction for contributions to religious organizations).

B. *Was Value Received In Exchange For Charitable Contributions?*

Even if the debtors received value, the question is whether that value was received "in exchange for" the contributions. *See* 11 U.S.C. § 548(a)(2). Here, however, no exchange took place. It is the church's policy to welcome all members to worship regardless of the size of any contribution if one is made at all. The church's offerings were in no way linked to the debtors' contributions. In no way was the worship bargained for as the contributions were purely voluntary driven only by the debtors' feelings of association and goodwill. The debtors' did not and would not have received anything more or less if they would have donated more or donated nothing. The same amount of heat, air conditioning, education and worship was available regardless of the debtors' contribution. The church neither explicitly nor implicitly bound itself to perform exclusively for the debtors or condition its performance on the debtors' contributions. The sermon is for the spiritual gratification of all in attendance, not just those who contribute money. The debtors participated as every other member and received what every other member received; everyone received nothing "in exchange for" their donations.[14]

The Internal Revenue Code further supports the conclusion that the debtors could not have received property in exchange for their contributions. Section 170 of the

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[14] The discussion regarding consideration *supra* at 893 also applies here. Just as the church services were not property because they were not supported by consideration, the debtors' contributions also lack consideration.

Internal Revenue Code permits taxpayers to deduct "charitable contributions." Specifically, a taxpayer may deduct a "contribution or gift to . . . [a religious organization] used exclusively for religious . . . purposes." 26 U.S.C. § 170(c)(4). Recently, the Supreme Court thoroughly analyzed section 170 holding that payments made to a religious organization *in exchange* for quid pro quo do not qualify as charitable contributions.[15] *Hernandez*, 490 U.S. at 691, 109 S.Ct. at 2145. The Court further explained that any benefit to the taxpayer, even those claimed as "purely religious in nature" could give rise to disallowance of a claimed charitable contribution. *Id.* at 691-95, 109 S.Ct. at 2145-46. Simply, the debtor cannot receive both a § 170 tax deduction and § 548 property at the same time. Unwittingly, the church's argument calls into question the right of its members to deduct contributions made to the church.

C. *The Cases.*

The church, going beyond the express language of the statute, cites *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr.N.D.Ga.1986). Moses stands for the proposition that church services constitute property within the meaning of section 548. *Id.* at 818. It is as if *Moses* had descended from Mount Sinai (or would it be Peachtree Street?) with another commandment: "THOU SHALT NOT AVOID RELIGIOUS CONTRIBUTIONS." However, in this instance Moses is trying to be more policymaker than lawgiver.

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[15] See consideration analysis *supra* at 893.

The *Moses* court held that "[a]lthough nothing was given to the Debtors in exchange for the tithes and offerings, this Court finds that the many services provided to the Debtors by the [church] constitute 'property' pursuant to § 548(d)(2)(A)." *Id.* at 818. This conclusion is puzzling and without textual support. The *Moses* court found that "property" was defined by *Black's Law Dictionary*. The *Moses* court quotes the definition. However, this definition is never used. Indeed, without explanation, analysis or the slightest attention to text, the *Moses* court holds that the tithes are property. *Id.* Adding to the problem, the *Moses* court also neglects to address a critical issue: was there an exchange?[16]

Reading between the lines of reasoning, it becomes apparent that the *Moses* court thought what it was doing was "right." While it is not a pleasant task to require a church to refund contributions, "[my] sole function is to enforce the statute according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241, 109 S.Ct. at 1030. Engaging in this important task, I must "presume that a legislature says in a statute what it means and means in a statute what it says." *Germain*, ___ U.S. at ___, 112 S.Ct. at 1149. After all, Congress is the primary public policymaking institution of our government. Absent Constitutional infirmities, when Congress speaks, its words must prevail. Clearly, the *Moses* court's interpretation is not the way Congress wrote the statue [sic]. When balancing the competing public policies of compensating creditors and leaving religious contributions inviolate, a policy in favor of contribution at the expense of creditors would be a

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[16] *See* footnote 6 *supra* and text.

defensible social decision. However, Congress has not made such a decision and it would be inappropriate for a court to substitute its policy decision for Congress'. Courts have no business bending the statute out of shape because they believe that Congress should or might have written the statute a different way.

The *Moses* court places heavy reliance on *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am.)*, 24 B.R. 973 (Bankr.N.D.Tex.1982). The *Missionary* court held that a corporation received reasonably equivalent value in exchange for charitable contributions to a church. *Id.* at 979. Again, the court glosses over the definition of value and its derivations equating the receipt of the church's "good will" with intangible property. *Id.* Specifically, the *Missionary* court found that

> [t]he morale of the employees and the good will of all of those people with whom [the debtor] dealt was reasonably enhanced by the continuation of the charitable contributions. Whether it is called "good will" or whether some other term is applied . . . reasonably equivalent value was received by the [debtor] in exchange for the challenged transfers.

Id. at 979. Again, while the decision may feel right, there is absolutely no textual support for such a conclusion.[17]

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[17] Beyond a finding of no textual support, I am troubled with the notion that it is the judges responsibility to calculate value of the services provided. Moreover, while the parties themselves have not raised First Amendment concerns, I believe they exist when entertaining the tasks the *Missionary* court would have me undertake. *See Hernandez v. C.I.R.*, 490 U.S. 680, 693-701, 109 S.Ct. 2136, 2146-50, 104 L.Ed.2d 766 (1989) *aff'g*

While I am *not* thrilled about making a church return contributions, especially under a statute titled "fraudulent transfers," I cannot adopt what the church, the *Moses* and *Missionary* courts urge as the voice of Congress is loud; property is value, charitable contributions are not.

III.

Conclusion

When Congress speaks as clearly as it has done here, the plain meaning of the legislation is conclusive, except in those "rare cases" in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. *Ron Pair Enters., Inc.*, 489 U.S. at 242, 109 S.Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). However, defining property as to not include the rendering of services does not contravene the

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Hernandez v. C.I.R., 819 F.2d 1212 (1st Cir.1987). As the First Circuit stated:

> [I]magine, a case in which the government monitored church records in a [sic] an attempt to place a monetary value on the benefit of all church services, group programs, and pastoral counselling generally available to contributing members. Such a case would present not only the problem of determining value but also the problem of excessive entanglement in the affairs [of] a religious institution.

Hernandez, 819 F.2d at 1218, *aff'd Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *see also* footnote 13 *supra* and text.

intent of the drafters of the Code. Indeed, such an interpretation does not conflict with any other section of the Code, the legislative history of section 548 or, for that matter, with any important state or federal interest. When Congress enacted the Code, it envisioned the expeditious and fair collection, liquidation and distribution of the debtors' *entire* chapter 7 estate. To that end, section 548 empowers the trustee to get back gratuitous transfers that have depleted the resources available to creditors. Here, the trustee has correctly asserted that power. The transfers fit squarely within section 548 and can be avoided. *See* 11 U.S.C. § 548(a).

The church has failed on all grounds to articulate any argument or policy reason why charitable contributions should not be avoided under section 548. The language being clear and in conformity with the intent of Congress, the plain meaning is conclusive.

THEREFORE, IT IS ORDERED:

1. The plaintiff's motion for summary judgment is granted;
2. The defendant's motion for summary judgment is denied;
3. The transfers by the debtors to the defendant between February 3, 1991 and February 3, 1992, totalling $13,450 are void; and
4. The plaintiff shall recover from the defendant the sum of $13,450 together with costs of $120 and interest as provided by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

CHAPTER 21B – RELIGIOUS FREEDOM RESTORATION

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398

(1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub. L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain

appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub. L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

§ 2000bb-2. Definitions

As used in this chapter –

(1) the term "governemnt" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub. L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or

otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

TITLE II – BANKRUPTCY

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

* * *

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

* * *

(d)(2) In this section –

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

* * *

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub. L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub. L. 98-353, title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub. L. 99-554, title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 101-311, title I, § 104, title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub. L. 103-394, title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142.)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Bruce and Nancy Young, Debtor(s)	BKY Case No. 4-92-0871 Chapter 7
Julia A. Christians, Trustee, Plaintiff, vs Crystal Evangelical Free Church, Defendant(s).	ADV No. 4-92-157 **STIPULATION**

Plaintiff Julia A. Christians, Trustee and Defendant Crystal Evangelical Free Church, hereby stipulate and agree as follows:

1. Plaintiff is the Trustee of this Chapter 7 bankruptcy case.

2. Bruce and Nancy Young, Debtors, filed a Chapter 7 bankruptcy petition on February 3, 1992.

3. At all times relevant to the claims stated in Plaintiff's Complaint, Debtors were members of Crystal Evangelical Free Church.

4. During the one year period preceding the Debtors' bankruptcy filing, from February 3, 1991 through February 3, 1992, Debtors contributed tithes to Defendant in the amount of $13,450.00.

5. The aforesaid contributions amounting to $13,450.00 are the transfers which Plaintiff's action seeks to recover.

6. Debtors supplemented their tithing with further gifts of their time and talent. Mr. Young has held numerous offices in the Church including elder, and has served as communion usher and offering counter. Mrs. Young was chair of the Church's Womens' Ministry Council, and has served as a volunteer receptionist. Both debtors also have served as officers of the day.

7. Defendant withdraws certain affirmative defenses asserted in its Answer to Plaintiff's Complaint, including the doctrine of laches, statute of limitations, waiver and estoppel.

8. Defendants regularly attended church services, participated in the Church's programs and had access to its facilities, but received no money or tangible property in exchange for their contributions.

9. Crystal Evangelical Church does not charge any membership or attendance fee or refuse support and services to members or attendees on the basis of nonpayment, but does teach that people should offer regular contributions to the Church.

10. Debtors' sworn bankruptcy schedules show total assets of $308,010.00 and total liabilities of $405,097.19.

11. Debtors' sworn bankruptcy Statement of Financial Affairs shows that debtors transferred no assets within the year preceding the bankruptcy filing.

12. Debtors' sworn bankruptcy schedules show that debtors exempted all equity in all assets.

LAPP, LAURIE, LIBRA, ABRAMSON
& THOMSON, CHARTERED

Dated: September 18, 1992

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Supreme Court, U.S.
FILED
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CLERK

(2)

No. 96-437

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

JULIA A. CHRISTIANS, TRUSTEE
Petitioner,
vs.
CRYSTAL EVANGELICAL FREE CHURCH
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Whether petitioner's constitutional challenges to the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), were presented to the Court of Appeals.

2. Whether the Bankruptcy Code authorizes, and the Free Exercise Clause and the Religious Freedom Restoration Act permit, a trustee in bankruptcy to recover from the debtors' church the amount of contributions that debtors made in good faith and ordinary course in the year preceding bankruptcy, where there is no evidence of intent to hinder or defraud creditors.

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STATEMENT OF THE CASE

The procedural history and substantive issues are complex, but one simple fact is dispositive fact in this Court: *petitioner never presented to any court below the constitutional questions allegedly presented in the petition.* The majority in the Court of Appeals held that:

> The parties did not raise the constitutionality of the RFRA, and we do not consider the constitutionality of the RFRA.

Pet. A22. The dissenter agreed:

> I understand that the constitutionality of RFRA is not before us as this case is currently postured.

Id. at A31 n.1 (Bogue, J., dissenting).[1]

This unanimous holding of waiver was clearly correct, and in any event, the waiver issue plainly does not deserve review in this Court. The details are as follows.

Bruce and Nancy Young, who are not parties to this adversary proceeding, filed for personal bankruptcy in 1992. The cause of the bankruptcy was the debtors' personal guarantees of the obligations of a failed business. Aff. of Bruce Young (Sept. 25, 1992). The debtors' sworn

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[1] The Petition for Writ of Certiorari, and the Appendices thereto, are cited as Pet. Page numbers beginning with A are part of the Appendices; unless otherwise indicated in parentheses, all citations to page numbers beginning with A are to the opinion of the Court of Appeals. The Appendices include a Stipulation, parenthetically designated as Stip.

bankruptcy schedules showed total liabilities of $405,097.19 and no non-exempt assets. Pet. A108 (Stip.).

In the year preceding bankruptcy, the debtors had contributed $13,450 to defendant, respondent here, Crystal Evangelical Free Church. *Id.* at A106 (Stip.). Petitioner, the Trustee in bankruptcy, sued the Church to recover these contributions as fraudulent transfers under 11 U.S.C. §548(a)(2) (1994), alleging that the contributions were made while the debtors were insolvent and that they were not in exchange for reasonably equivalent value. No issue was raised under the companion section, 11 U.S.C. §548(a)(1) (1994), which authorizes the Trustee to recover transfers made "with actual intent to hinder, delay, or defraud" any creditor. There is no suggestion that the contributions were not made in good faith and in the ordinary course of a long-standing pattern of contributions. Thus, "the trustee has not accused the debtors and the church of any improper conduct, much less actual fraud." Pet. A13.

The Bankruptcy Court and the District Court each entered judgment that the Trustee was entitled to recover the disputed contributions from the Church. *Id.* at A99 (Bankruptcy Court), A74 (District Court). The Church appealed, raising multiple arguments. The Church argued that §548(a)(2) does not authorize the Trustee's claim, that the Trustee's interpretation of §548(a)(2) discriminates against religion in violation of the Free Exercise Clause, and that §548(a)(2) must be interpreted to avoid this unintended burden on religious exercise, citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

On May 28, 1993, pursuant to Fed. R. App. Proc. 44, the Church notified the clerk that it was challenging the

constitutionality of §548(a)(2) as applied.[2] The clerk failed to act on this notice, and the parties and their amici briefed the case. In November 1993, the President signed the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), and each side and the amici filed supplemental briefs addressed to that Act.

On Feb. 9, 1994, after briefing and supplemental briefing was completed, the clerk at last notified the Attorney General of the Church's constitutional claim.[3] The United States intervened and filed a brief, and all parties and amici were invited to respond with a third round of briefs. Thereafter, after the case had come to focus more on the interpretation of RFRA than on the constitutionality of §548(a)(2), the United States withdrew its brief and withdrew its intervention.

In May, 1994, this Court held that §548(a)(2) should not be interpreted in ways that upset practices that had long co-existed with the law of fraudulent transfers. *BFP v.*

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[2] Fed. R. App. Proc. 44 provides:

> *It shall be the duty of a party* who draws in question the constitutionality of any Act of Congress in any proceeding [where the government is not a party] upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, *to give immediate notice in writing* to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

(emphasis added).

[3] The Court of Appeals' statement that no party had requested notification to the Attorney General is incorrect. *Compare* Pet. A10 (opinion of the Court of Appeals) *with* Pet. 1 (accurate statement of Trustee that the Court's notice to the Attorney General followed "a request by Appellant (Respondent in this Court), who had challenged the constitutionality of 11 U.S.C. §548(a)(2)").

Resolution Trust Corp., 114 S.Ct. 1757 (1994). The Church called this decision to the attention of the Court of Appeals in a letter under Fed. R. App. Proc. 28(j).

The case was argued by the parties and amici in September, 1994, and remained under submission until May, 1996. The Court of Appeals then interpreted §548(a)(2) to authorize the Trustee to recover the contributions to the Church. Pet. A12-A18. In making this interpretation, the Court of Appeals did not consider either *Catholic Bishop* or *BFP*. The Court of Appeals then held that §548(a)(2), as so interpreted, substantially burdens a religious practice and is not necessary to serve any compelling interest. Pet. A24-A30. Thus, the Court held, the Religious Freedom Restoration Act provides a defense to the Trustee's claim under §548(a)(2), and the Trustee is not entitled to recover from the Church. Pet. A31. The Court therefore found it unnecessary to reach the free exercise challenge to §548(a)(2). Pet. A19.

Were this Court to grant certiorari to consider the statutory question raised in the petition, the Church would defend the judgment below on each of the alternate grounds that support the judgment. No conditional cross-petition is necessary, because none of these grounds would in any way change the judgment of the Court of Appeals, which was simply that the Trustee take nothing by her complaint. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

REASONS FOR DENYING THE WRIT

I. No Constitutional Issues Are Presented, Because None Were Presented Below.

The Trustee purports to present three questions concerning the constitutionality of the Religious Freedom Restoration Act. But the key to the case finally appears near the end of the petition: "*[B]oth the majority and the dissent* incorrectly *stated that the constitutionality of RFRA was not before them.*" Pet. 25 (emphasis added).

All the lengthy argument purportedly addressed to "The Eighth Circuit's Decision Upholding RFRA," *id.* at 11, 16, is thus misleading. There was no decision upholding RFRA; there was only a decision that the Trustee had not challenged RFRA's constitutionality. The only question presented with respect to the constitutional issues is a simple question of waiver, with facts unique to this case. The constitutional issues are not reviewable here; petitioners cannot present to this Court arguments that were not presented below. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

The waiver issue itself, which is presented, is plainly not deserving of review in this Court. In any event, the Court of Appeals was clearly correct; the Trustee did not raise constitutional issues in any way that was even arguably timely.

The majority and the dissent agreed that no constitutional challenge to RFRA had been presented. Pet. A22 (majority), A31 n.1 (dissent) (both quoted *supra* at 1). These judges were not seeking to duck the issue. To the contrary, the dissenter plainly regretted his inability to reach the constitutional issue. *Id.* Judge McMillian, who wrote

for the majority, had earlier demonstrated his willingness to reach the issue. *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (McMillian, J., concurring), *cert. denied* (No. 96-5016, Oct. 7, 1996). The simple fact is that the Trustee provided no way for any court to reach the issue.

This case was briefed three times prior to oral argument--the original briefs, supplemental briefs addressed to RFRA, and briefs addressed to the intervention of the United States. None of those briefs raised any of the constitutional arguments now asserted.

The Trustee first raised a version of her Question 1--that RFRA unconstitutionally favors religion--at oral argument, conditionally and in answer to a question. She quotes these two sentences of the oral argument at Pet. 26. Those two sentences are the best that she can do. She also says, without quotation or citation to any page number, that she made this argument in her second brief. *Id.* at 25-26. She did not, and whatever implied allusion she might be referring to must have been vaguer, shorter, or less explicit than the two sentences she quotes from oral argument. If she had ever said anywhere that "RFRA is unconstitutional," she would have quoted that.

The Trustee first raised her Question 3--the separation of powers argument--in a letter to the Court of Appeals, dated Jan. 23, 1996, sixteen months *after* oral argument. She does not claim otherwise; she attributes this argument to "post-hearing submissions." Pet. 26.

The Trustee's Question 2, whether RFRA violates the entanglement prong of this Court's Establishment Clause doctrine, was never presented below, not even on rehearing. The petition says vaguely that "all the constitutional issues were debated in the court of appeals," but it never says when

or where the Question 2 was presented. In fact, it was not presented.

The Trustee made no effort to have any constitutional challenge certified to the Attorney General, as required by 28 U.S.C. §2403 (1994), until the Suggestion for Rehearing En Banc. If the Trustee had actually challenged the constitutionality of RFRA, Appellate Rule 44 would have imposed a "duty . . . "to give immediate notice in writing" of the constitutional claim.[4] The Trustee's first effort to comply with this duty came in a footnote to the Suggestion for Rehearing En Banc.

All parties in the case were well aware of Rule 44; the Church had timely notified the Court of its as-applied constitutional challenge to §548(a)(2), and this notice had led to the intervention of the United States. It was not that the Trustee forgot about Rule 44, but rather that she had made no constitutional challenge to RFRA and never conceived herself to be making such a challenge.

It is true that as the prevailing party in the District Court, the Trustee could defend the judgment on any ground that would support it. But this means only that arguments not relied on by the District Court could be timely asserted in the Court of Appeals. This rule did not mean that new arguments could be raised after briefing was complete, or after judgment was entered; the right to defend the District Court's judgment on any ground does not excuse appellees from the necessities of orderly appellate litigation. Despite three rounds of briefing, four post-argument letters to the Court of Appeals, and the passage of nearly three years from the filing of the appeal to its disposition, the Trustee did not

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[4] The Rule is quoted in note 2, *supra*.

clearly formulate a constitutional challenge to RFRA or seek the participation of the Attorney General until her Suggestion for Rehearing En Banc. Litigation must come to an end sometime, and the Court of Appeals correctly held that this argument came far too late.

The Court of Appeals decided only the waiver issue, so that the constitutional issues are not presented. Even if there were some plausible argument that the Court of Appeals erred on the waiver issue, the waiver issue is purely factual and of no general importance; it plainly does not deserve review in this Court. Either way, there is nothing to be decided here.

II. This Case Should *Not* Be Held for *City of Boerne v. Flores* or Any Other Case in Which the Constitutionality of RFRA Might Be Decided.

This Court recently granted certiorari in *City of Boerne v. Flores* (No. 95-2074), presenting the question whether RFRA is constitutional as applied to state and local governments. If the constitutional issues had been preserved in this case, there would be some overlap between this case and *Flores*, although the focus here would be on the quite distinct question whether RFRA is constitutional as applied

to federal law.[5] But the essential point is that none of those issues were preserved.

Petitioner concedes that all three judges below concluded that the constitutional challenge was waived here. Pet. 25. The only issue decided was waiver, and *Flores* could not possibly cast any light on waiver. On reconsideration in light of *Flores*, the Court of Appeals could only decide once again that the constitutional challenge was waived. A hold could do nothing but further delay the resolution of this long-delayed litigation.

III. The Statutory Question Is a Fragment of a Much More Complicated Question, Not Adequately Presented in the Petition and Not Ready for Review by this Court.

In a brief passage near the end of the petition (Pet. 23-25), the Trustee attempts to present a fourth Question: whether RFRA permits unsecured creditors of bankrupt debtors to recover from the debtors' church the amount of contributions that were made in good faith and ordinary course in the year prior to bankruptcy. There are many reasons not to review this Question.

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[5] Congressional power to enact RFRA is especially clear with respect to federal law. All Congress has done is to limit the reach of laws that *it* enacted, laws over which *it* has plenary power. Either limiting or extending the reach of §548(a)(2) is equally an exercise of the bankruptcy power; Article I authorizes Congress to determine the reach of laws that it enacts pursuant to Article I. *See EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (rejecting, with a justified tone of incredulity, the argument that Congress cannot apply RFRA to federal law).

First, there is no split in the circuits; the decision below is the only appellate decision on the issue. The Trustee properly does not claim any conflict with *Scholes v. Lehmann,* 56 F.3d 750, 759-61 (7th Cir.), *cert. denied sub nom. African Enterprise, Inc. v. Scholes*, 116 S.Ct. 673 (1995), in which the proceeds of a Ponzi scheme were donated to various religious organizations. In that case, no RFRA or free exercise claim was decided. *See* 56 F.3d at 760. Moreover, the case proceeded under an Illinois law that parallelled §548(a)(1), 56 F.3d at 753, and there was overwhelming evidence of actual intent to defraud creditors. Here, there is no such evidence and no such claim, Pet. A13, and the proceeding is brought under the prophylactic rule of §548(a)(2).

Second, the petition does not present "whatever is essential to ready and adequate understanding of the points requiring consideration;" that alone "is sufficient reason for the Court to deny a petition." Sup. Ct. Rule 14.4. Issues that required three rounds of complicated briefing are presented in less than three pages; the petition simply omits issues that are inextricably intertwined with the issues allegedly presented. The Court cannot determine whether the Church or the debtors are substantially burdened under RFRA, or whether that burden serves a compelling interest by the least restrictive means, without understanding whether and how the Bankruptcy Code applies to the disputed transactions. Nor can the Court understand how the Bankruptcy Code applies without understanding the Church's claim that the Trustee's interpretation of the Bankruptcy Code would discriminate against religion in violation of the Free Exercise Clause.

Third, and related to the points omitted from the petition, this dispute is of unusual complexity. Each side offers many alternate theories and many fine distinctions.

Not only is there no conflict in the circuits on the end result, but there is no conflict on any of the constituent issues. The courts of appeals have not begun to explore all the variations. Some of these alternate theories have not been decided by any appellate court; none have been decided by more than one. These issues require further clarification through further litigation before they are ripe for review by this Court.

Fourth, the decision below was clearly correct on the issue the Court of Appeals found dispositive. If RFRA does not apply when the law reaches inside a church to reverse and nullify a completed act of religious obligation, then RFRA would be trivialized from the beginning.

We offer some explanation of the underlying issues to illustrate these points. Most fundamentally, the Trustee and the courts below misinterpreted §548(a)(2). The section authorizes the Trustee to recover certain transfers of property not in exchange for reasonably equivalent value. The statute defines "value" as "property," but the courts have sensibly interpreted property to include any thing of value. Paid-for entertainment counts as value; it has "psychic and other intangible values." *In re Chomakos*, 69 F.3d 769, 772 (6th Cir. 1995), *cert. denied sub nom. Allard v. Flamingo Hilton*, 116 S.Ct. 1568 (1996). In a service economy, it is obvious that services must count as value. *See, e.g., In re Investors Funding Corp.*, 523 F. Supp. 533, 549-50 (S.D.N.Y. 1980) (noting that "the only conceivable basis for a claim" to the contrary would be if the services were not performed "in accordance with accepted professional standards," and holding that a malpractice claim could not be litigated in the guise of a fraudulent transfer claim). It is equally settled that executory promises count as value. Pet. A85-A89 (opinion of the Bankruptcy Court, collecting authorities). If either services or promises did not

generally count as value, it would be unnecessary for §548(d)(2) to create an exception, providing that an executory promise to provide support to the debtor is not value.

The debtors received from the Church worship services, other pastoral services, and the use of a physical facility in which to worship. These services were of great value to the debtors, and they are of constitutional value under the Free Exercise Clause. These services could not be resold for cash, but that does not distinguish them from most other services provided to consumers. Most consumer expenditures provide value of some sort to the consumers, but very few consumer expenditures provide any value to the consumers' creditors. Services and perishables are quickly consumed; most consumer "durables" rapidly depreciate; homes and many other consumer purchases are exempt from the claims of creditors. If religious services were of value to the debtors, it is irrelevant that they cannot be converted to cash for creditors.

The Bankruptcy Court correctly found that "the debtors, before and after making their contributions, did receive services," and that "[t]he debtors plainly benefited from acts performed by the church." Pet. A85 n.7 (opinion of the Bankruptcy Court). The District Court acknowledged that the debtors received benefits from the Church, but seemed to doubt whether those benefits counted as value. *Id.* at A56-A57 (opinion of the District Court). The Court of Appeals assumed that the debtors received valuable services from the Church and that the value of these services was reasonably equivalent to the contributions. *Id.* at A17 & n.4. But all three courts held that the equivalent value the debtors received from the Church was not in exchange for the debtors' contributions. *Id.* at A17-A18 (Court of Appeals); *id.* at A58-A59 (District Court); *id.* at A89-A90

(Bankruptcy Court). That is, each court held that the debtors could have taken advantage of the Church, consuming its services without contributing to the cost of producing those services.

This wooden interpretation of "in exchange for" was error. *See* Pet. A39-A42 (Beam, J., concurring in denial of rehearing en banc); *In re Moses*, 59 B.R. 815 (Bankr. N.D. Ga. 1986); *In re Missionary Baptist Found.*, 24 B.R. 973 (Bankr N.D. Tex. 1982). If church members collectively did not contribute, the Church could not exist, and the debtors would have received no valuable religious services from the Church. The debtors contributed their fair share, calculated in accordance with their understanding of religious obligation, to the cost of services that they valued highly. The congregation and each member received religious services in exchange for the congregation's, and therefore each member's, contributions. This transaction is different in kind from the fraudulent transactions that §548(a)(2) is designed to detect.[6]

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[6] This interpretation of "in exchange for" in §548(a)(2) is consistent with the rule of *Hernandez v. Commissioner*, 490 U.S. 680 (1989), that the Commissioner of Internal Revenue may disallow charitable-contribution deductions for payments made in exchange for specific benefits, interpreting 26 U.S.C. §170 (1994). (In fact, the Commissioner generally allows deductions for payments made even in explicit exchange for religious benefits that lack market value. Rev. Rul. 70-47, 1970-1 Cum. Bull. 49; *see Powell v. United States*, 945 F.2d 374 (11th Cir. 1991)).

Contributions to churches, made in the general expectation of receiving religious services from the church, may be a gift under the Internal Revenue Code and an exchange under the Bankruptcy Code, if the interpretation of each Code is consistent with that Code's policy. In fact, a common policy underlies both interpretations: In the case of charitable, educational, and religious organizations that depend on contributions from their members, both tax deductibility and nonliability

Two rules of interpretation highlight the error of the courts below. First, §548(a)(2) should not be interpreted "to disrupt the ancient harmony" of long settled understandings of proper behavior by debtors and creditors. *BFP v. Resolution Trust Co.*, 114 S.Ct. 1757, 1764 (1994). In *BFP*, this Court held that §548(a)(2) does not invalidate the long-established practice of bidding far less than the market value of property at foreclosure sales, and the Court emphasized that "reasonably equivalent value" does *not* mean market value. *Id.* at 1761. Similar considerations apply here. Fraudulent transfer law is of ancient origin, yet we are aware of no effort to apply that law to routine contributions to churches prior to *In re Missionary Baptist Found.*, 24 B.R. 973 (Bankr. N.D. Tex. 1982). That effort was unsuccessful, although the facts there made the claim more plausible than here. Another such claim was rejected in *In re Moses*, 59 B.R. 815 (Bankr. N.D. Ga. 1986). We are not aware of any case upholding such a claim prior to the decision of the Bankruptcy Court in this case, a decision that has now been properly reversed on RFRA grounds.

Second, §548(a)(2) should not be interpreted to burden religious exercise in the absence of an affirmatively expressed Congressional intent to impose such a burden. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). RFRA confirms the wisdom of *Catholic Bishop*. RFRA shows that by overwhelming margins, Congress does not want to burden religion without compelling reason. Given that policy

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to fraudulent transfer claims encourage contributions and discourage "free riders" who take advantage of the opportunity to benefit without contributing. The lower courts' interpretation of the Bankruptcy Code in this case virtually requires church members facing financial risks to free ride, a result that is seriously inconsistent with the Internal Revenue Code's policy of rewarding those who do not free ride.

commitment, this Court was plainly right to presume that Congress would not want to burden religion inadvertently.

Of course there is no affirmative evidence that Congress intended §548(a)(2) to make churches liable to refund contributions from members who later file for bankruptcy. Congress intended §548(a)(2) to simplify litigation in inherently suspicious transactions--cases in which insolvent debtors give away money or property and get nothing in return that is of any value even to the debtors. But the debtors' transactions here were not suspicious, and the debtors certainly did not believe that they were getting nothing in return for their contributions. This case is simply not within the set of suspicious transactions that Congress addressed. It can appear to be similar only because the courts below erroneously assessed an exchange of religious values by the norms of commercial exchanges in which the parties mistrust each other and must necessarily insist on legally binding commitments to perform.

The Court of Appeals' interpretation of "in exchange for" distinguishes churches from secular groups, on the ground of a feature that is essential to churches. Every private club or association must raise money to support its operations. Secular clubs generally charges dues for membership and fees for services; members who do not pay are excluded. Thus, if the debtors had paid the money at issue to their country club, the Trustee would recognize the transfer as a payment in exchange for club membership and club services.

The debtors' contributions to their Church served the same economic function for the Church as payments of dues and fees to a country club: they enable the association to function. But churches cannot exclude those who fail to pay; such a policy would eliminate evangelism and charitable

works, and thus fundamentally change the nature and mission of most churches. So the Court of Appeals interpreted §548(a)(2) to apply here because of--*solely and precisely because of*--a practice that is essential to the mission and structure of churches. This discrimination against religious practice would require compelling justification under the Free Exercise Clause, even if RFRA had never been enacted. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

The Trustee's interpretation of §548(a)(2) also discriminates against religion in other ways, some of which further reveal that the interpretation is a misinterpretation. Section 547 authorizes the Trustee to recover certain transfers that prefer some creditors over others, but not if the transfer was "made in the ordinary course of the business or financial affairs of the debtor and the transferee." 11 U.S.C. §547(c)(2) (1994). Thus, regular monthly payments to a preferred creditor are not recoverable, because there is nothing suspicious about continuing a series of payments in ordinary course.

There is no comparable ordinary-course exception in §548(a)(2), even though there is nothing suspicious about continuing a series of contributions in ordinary course.[7] Under the Trustee's interpretation, the lack of an ordinary-course exception in §548(a)(2) discriminates against ordinary-course contributions, most of which go to churches, as compared to ordinary-course payments to preferred

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[7] A case where the debtor suddenly gave a large portion of his assets to his church on the eve of bankruptcy would arguably be very different; the contribution would not be in ordinary course, and the timing and irregularity of the transaction might be badges of fraud, supporting a possible inference of intent to hinder creditors under §548(a)(1).

creditors under §547, which rarely go to churches. This discrimination requires compelling justification. But it also casts doubt on the Trustee's interpretation of the statute. Most likely, the reason there is no ordinary-course exception in §548(a)(2) is that the section was never intended to apply to ordinary-course transactions that raised no suspicion of fraud. Congress was not thinking about routine contributions to churches; it was thinking about simplifying the litigation of suspicious transactions.

We have not yet noted the most fundamental discrimination in the Trustee's interpretation of §548(a)(2)--its discriminatory rules about what debtors can do with their property in the year preceding bankruptcy. The general rule in bankruptcy is that the debtors control the disposition of their funds prior to bankruptcy. The debtors' money is *not* the property of the unsecured creditors; it remains the property of the debtors until the creation of a bankruptcy estate. 11 U.S.C. §541 (1994). Section 548(a) recognizes the debtors' ownership; it expressly and exclusively applies only to transfers "of an interest *of the debtor* in property." Debtors can and do spend their money in all sorts of ways that produce value to them, but no value to their creditors. Indeed, this pattern of spending is the essence of why debtors go bankrupt.

These other expenditures that produce no value for creditors are not fraudulent transfers recoverable by trustees in bankruptcy, even in extreme cases. Thus, debtors who gamble their money away in casinos have not committed a fraudulent transfer. *In re Chomakos*, 69 F.3d 769 (6th Cir. 1995), *cert. denied sub nom. Allard v. Flamingo Hilton*, 116 S.Ct. 1568 (1996). Debtors who waste their money on travel, fine meals, alcohol, or prostitutes all receive something in return, and thus have not committed fraudulent transfers. *See id.* at 772. Debtors who spend all their

money on exempt property have not committed fraudulent transfers, even though they deprive their creditors of all value in their property. *See, e.g., In re Armstrong*, 931 F.2d 1233 (8th Cir. 1991). There is even authorities that debtors who pay debts barred by the statute of limitations have not committed fraudulent transfers, because the moral obligation is sufficient to justify the transfer. *In re Prejean*, 994 F.2d 706 (9th Cir. 1993).

The general rule is that the Bankruptcy Code protects the debtors' discretion to use their own money prior to bankruptcy. One of the very few things debtors cannot do, under the Trustee's interpretation, is give money to their church.

The result of these rules is that some 96% of chapter 7 bankruptcies are no-asset cases. Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. Rich. L. Rev. 303, 310-11 & n.30 (1988) (reporting local and national data). Non-tithing debtors dissipate their funds in other ways; there is no basis for the Trustee's belief that the creditors would get more if debtors were prevented from tithing, and thus no basis for the Trustee's belief that the creditors' money somehow went to the Church. To the contrary: creditors would benefit from the Trustee's proposed rule only if debtors *do* tithe and thus enable the Trustee to sue churches. The Trustee's interpretation would make churches the principal source of funds for distribution in consumer bankruptcies. As the dissenting judge argued, this liability would be "one of the creditor's *few* protections." Pet. A36 (Bogue, J., dissenting) (emphasis added). But Congress could not (even if it had so intended) put the religious practice of tithing in a narrow exception to the general rule of the bankruptcy system, burdening tithing

to provide an unusual protection for creditors when it is mostly unwilling to burden secular transactions to provide more general protections for creditors. This discrimination against religion requires compelling justification under *Smith* and *Lukumi*. See *supra* at 16.

All of these issues under the Bankruptcy Code and the Free Exercise Clause are necessarily entailed in the statutory RFRA issue that the Trustee sought so inadequately to present to this Court. With respect to that issue, the decision below is clearly correct. RFRA provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b) (1994). The Court of Appeals held that allowing the Trustee to recover the debtors' contributions to the Church would substantially burden the debtors' free exercise of religion, because "the debtors consider tithing to be an important expression of their sincerely held religious beliefs," and recovery of these contributions "would effectively prevent the debtors from tithing." Pet. A25. The Court of Appeals further held that the government has no compelling interest in authorizing the Trustee to recover these contributions, because an exemption for good-faith religious contributions would not "undermine the integrity of the bankruptcy system as a whole," and an exemption's impact on particular debtors and creditors is simply not as important as interests that have been held compelling. *Id.* at A29-A30. Thus, under the explicit provisions of RFRA, the burden of §548(a)(2) cannot be applied to the debtors or the Church.

A contrary holding would trivialize RFRA. If the decision below were reversed, it would become a checklist

item in every individual bankruptcy to demand return of any contributions to churches; churches would become the most common source of partial payment in consumer bankruptcies. This liability would impose substantial financial burdens on churches, and it would reverse and nullify acts of religious obligation.

The government cannot possibly have a compelling interest in maximizing the recovery for creditors when the Bankruptcy Code as a whole is so solicitous of debtors. Debtors here held $308,010 in assets that are exempt from all claims of creditors. Pet. A107-A108 (Stip.). Congress had reasons that it deemed sufficient for such generous exemptions, but this policy judgment plainly reveals that Congress does *not* pursue a policy of maximizing recovery for creditors. "There can be no serious claim" that such a neglected interest is compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-20 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989).

Any gift to a church made for the purpose of hindering creditors is recoverable under §548(a)(1); there is no such claim here. There is no compelling reason to subject churches to the prophylactic rule of §548(a)(2), which was designed only to simplify proof of likely frauds, and there is no reason in the policy of the statute to apply it to ordinary-course contributions to churches where there are no badges of fraud.

The foregoing analysis demonstrates both the complexity of this case and the probable correctness of the judgment below. There is no split in the circuits, the issues are not adequately presented in the petition, and the competing positions have not been developed through a

series of cases. At best it would be premature for this Court to consider these issues, and in fact, it may never be necessary for this Court to consider these issues.

CONCLUSION

The constitutional challenge to RFRA is not presented; it was clearly, unambiguously, irretrievably waived. The statutory issues are not adequately presented and are not ready for review by this Court. The free exercise issue, the *BFP* issue, and the *Catholic Bishop* issue, were never passed on below. Petitioner should not be allowed to re-open this very complicated and long-delayed litigation, whatever this Court ultimately holds about the constitutionality of RFRA. The petition for writ of certiorari should be denied.

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No. 96-437

In the
Supreme Court of the United States
October Term, 1996

IN Re: BRUCE YOUNG AND NANCY YOUNG,
Debtors.

JULIA A. CHRISTIANS, TRUSTEE,
Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF THE MINNESOTA CIVIL LIBERTIES UNION
In Support of the Position of Petitioner.

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THE MINNESOTA CIVIL LIBERTIES UNION'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF

The Minnesota Civil Liberties Union ("MCLU") hereby respectfully moves this honorable Court for an Order permitting the MCLU to file an *amicus curiae* brief in the above-captioned matter. The respondent, Crystal Evangelical Free Church, refuses to consent to the MCLU's participation.

The MCLU's interest in this case is sincere. Its sole purpose is to preserve and protect civil liberties. To that end, the MCLU identified two infirmities in the Eighth Circuit's holding below. First, the Eighth Circuit applied the Religious Freedom Restoration Act, 42 U.S.C. 2000bb1-4 ("RFRA") in a manner that grants an exclusively religious exemption from the avoidable transfers provisions of the Bankruptcy Code and in so doing, it has changed the rules and relevant inquiries in all commercial transactions, subjugating those rules and inquiries to individual religious preferences.

Second, by enacting RFRA, Congress has impermissibly usurped the role of the judiciary. While the MCLU is not a proponent of this Court's holding in Employment Div. v. Smith, 494 U.S. 872 (1990), the MCLU passionately believes that allowing Congress, which is accountable to the majority's will, to in effect overrule this Court is more detrimental to civil liberties than is a judicial decision with which the MCLU disagrees.

For these reasons, the MCLU respectfully asks this Court to issue an Order allowing the MCLU to file the attached *amicus curiae* brief in this case.

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STATEMENT OF INTEREST OF THE MINNESOTA CIVIL LIBERTIES UNION

The Minnesota Civil Liberties Union ("MCLU") seeks to appear in this case as *amicus curiae*.[1] It is a non-profit, non-partisan organization whose purpose is to protect the rights and liberties established by the United States Constitution.

The MCLU's interest in this case is twofold: first, the United States Court of Appeals for the Eighth Circuit erred by violating the Establishment Clause of the First Amendment in its application of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993) ("RFRA"); and second, Congress violated the doctrine of separation of powers by enacting RFRA in the first instance.

The results of these errors are profound. The Eighth Circuit attempted to foster free exercise rights in its application of RFRA. However in so doing it has singled out religious conduct and granted it a preference which is unavailable in a secular context. Far from encouraging the free exercise of religion, the Eighth Circuit's holding here will discourage creditors from transacting business with religious adherents whose faith encourages or requires tithing. The decision below breeds the very religious divisiveness that the Establishment Clause was intended to thwart.

In addition, Congress exceeded its constitutional authority in enacting RFRA. Congress' purpose in enacting RFRA was, unmistakably, to reverse this Court's Free Exercise Clause jurisprudence. No matter how well intended, Congress' effort is misguided. This Court, not Congress, is empowered to determine the scope of the constitutional protection to practice one's religion. Any attempt by Congress to usurp this Court's

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[1] The position presented in this brief is solely that of the Minnesota Civil Liberties Union. It does not represent the position of the American Civil Liberties Union.

role takes this nation a step closer to subjecting minority religious practices or beliefs and dissident or fringe voices to the potentially intolerant majority, a majority to which Congress must answer. The scope of religious liberty under the Constitution is exclusively the province of this Court which, unlike Congress, has no master but the enduring values embodied in the Constitution.

REASONS FOR GRANTING THE WRIT

This case exposes RFRA's constitutional infirmities in two ways. As applied here, RFRA creates a constitutionally repugnant establishment of religion with a concomitant chilling effect on free exercise rights. Moreover, RFRA grows out of Congress' unconstitutional usurpation of judicial authority which endangers the integrity of the very structure of our constitutional system of governance.

This Court already recognized the importance of analyzing RFRA's constitutionality by granting a Writ of Certiorari in City of Boerne v. Flores, ____ U.S. ___, 65 USLW 3017 (1996). This case differs from Flores only in that this case concerns RFRA's application to a federal rather than a state law. But for Flores' concern with the doctrine of federalism, the reasons under Supreme Court Rule 10 for which this Court should consent to review this case are identical to those in Flores and will not be rehashed here. Suffice it to say that the important question of RFRA's constitutionality has spawned hundreds of state and federal decisions since Congress passed RFRA in 1993. The MCLU respectfully urges this Court to review this case in addition to Flores so that it can address the constitutionality of RFRA as it applies in the federal statutory arena.

I. THE EIGHTH CIRCUIT'S APPLICATION OF RFRA VIOLATES THE ESTABLISHMENT CLAUSE.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion. . ." U.S. Const. Amend. I. In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court articulated a three-part test to determine whether government action constitutes an "establishment of religion" in violation of the First Amendment. Id. at 612-13. The Lemon test provides that state actions must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement between government and religion. See Lee v. Weisman, 505 U.S. 577, 585 (1992); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 395 n. 7 (1993) (applying Lemon test and noting that it remains good law). Applying the Lemon test to the decision below renders RFRA a constitutionally prohibited establishment of religion.

The Eighth Circuit applied RFRA to grant an exemption from the Bankruptcy Code to the practice of tithing, or donating money to a religious institution. The court below held that such tithes are exempt from the avoidable transfers provisions of the Bankruptcy Code, 11 U.S.C. § 548 (1978). The only beneficiaries of this exemption are religious organizations and they enjoy this exclusive benefit at the expense of the legal framework on which merchants rely when transacting business.

Congress was clear in promulgating its purpose in enacting RFRA:

> Purpose
>
> The purposes of this chapter are -

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b). The only purposes of RFRA are to create a cause of action available exclusively to religious adherents and to define the scope of the adherents' rights to practice their faith. As applied, RFRA blatantly contravenes the first prong of the Lemon test.

The effect of applying RFRA to the Bankruptcy Code here is to carve out an exemption in the Code for religious institutions that receive charitable but avoidable transfers. The exemption does not apply to any other charitable organization. By creating this lack of neutrality in its application, the Eighth Circuit has imbued RFRA with the primary effect of advancing religion.

This Court has repeatedly held that neutrality is the linchpin in evaluating government action under the effects prong of Lemon. "Neither the state nor the federal government. . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Bd. of Education, 330 U.S. 1, 15-16 (1974). Accord, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591 (1989). This Court

> has rejected unequivocally the contention that the establishment clause forbids only

> governmental preference of one religion over another. . . . In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Abington School District v. Schempp, 374 U.S. 203, 216-226 (1963). This Court reaffirmed the neutrality principle just last year, in Rosenberger v. Rector and Visitors of the University of Virginia, ___ U.S. ___, 115 S.Ct. 2510, 2521 (1995).

This is not to say that government must be indifferent or insensitive to religion nor is Congress forbidden from enacting laws through which religious institutions advance their ends. It is simply that government cannot serve as the vehicle for that advancement.

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under Lemon, it must be fair to say that government itself has advanced religion through its own activities and influence.

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987). Here, government itself has advanced religion. When Congress enacted RFRA it effectively created an exclusively religious exemption to the Bankruptcy Code. In so doing, it altered commercial practices and made commercial transactions contingent on one party's religious beliefs and practices. RFRA, as applied here, subordinates secured debt and senior creditors to a religious organization that encourages the tithe. It thus infuses business transactions with the specter that religion may justify a breach of contract and excuse liability for that breach. This advances religion to the

point that one's faith now may control the commercial rights of others.

RFRA as applied here may also ultimately inhibit the free exercise of religion. Religion is now a relevant aspect of commercial transactions. Prudent lenders should reasonably inquire into their customers' religious practices. This fact certainly could result in a chilling effect on tithing, and therefore on one's right to freely practice his or her faith. See Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, 1423 (8th Cir. 1994) (Bogue, J., dissenting).

RFRA has elevated religion above the rules of commercial transactions and it threatens to chill free exercise by effectively inhibiting transactions with those whose religion encourages tithing. As applied here, RFRA has the primary effect of advancing religion to the point that it will inhibit free exercise. RFRA fails the second prong of the Lemon test.

The Eighth Circuit's application of RFRA also excessively entangles government and religion and, therefore, is unconstitutional under the third prong of Lemon. Government's excessive entanglement with religion under RFRA manifests itself in two ways here. First, RFRA compels courts to evaluate the substantiality or the sincerity of a claimant's belief. 42 U.S.C. § 2000bb.1(a). This element of RFRA directly contradicts Supreme Court precedent.

> Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (citations omitted). In this case the Eighth Circuit constructed a test for weighing the sincerity of religious belief, and discussed whether the religious adherents here were compelled

to tithe or merely encouraged to do so. Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407 at 1418. This inquiry is impermissible because it enmeshes courts in the process of assessing religions and determining which practices and beliefs are central to those faiths at issue. See Widmar v. Vincent, 454 U.S. 263, 269-70, n. 6 (1981); Hamilton v. Schriro, 74 F.3d 1545, 1567 (8th Cir.) (McMillian, J., dissenting in part) cert. denied, ___ U.S. ___, 65 USLW 3262 (1996); Smith v. Fair Employment and Housing Comm'n., 913 P.2d 909, 913-39 (Cal. 1996) (Mosk, J., concurring). Courts cannot make such inquiries. RFRA's demand that courts do so and the Eighth Circuit's implementation of that RFRA standard violate the third prong of the Lemon test.

Moreover, the Eighth Circuit has expressly granted the exemption to those religions that encourage tithing. It is unclear whether this exemption extends to donations to religious entities that allow, but do not promote tithing. It is also unclear if this exemption applies to religiously-motivated contributions to secular charitable organizations. It is unclear whether every religiously-based justification for a donation will give rise to a RFRA exemption from the Bankruptcy Code, or if only those religions that traditionally require or encourage the tithe will enjoy the exemption.

In short, the flood gates are now open. Through RFRA, Congress has compelled courts to evaluate the centrality of particular religious practices, to compare and distinguish the teachings and commands of various religions to determine the import to a faith of a charitable act when laid next to the tenets of a different faith. RFRA engenders the divisiveness between the differing beliefs and practices of the different religions and appoints government, through the courts, as the ultimate arbiter to determine which religiously motivated practices are central enough to exempt adherents from the avoidable transfer provisions of the Bankruptcy Code. See Larkin v.

Grendel's Den, Inc., 459 U.S. 116, 127 (1982). This violates Lemon's third prong.

II. RFRA VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

Nearly two hundred years ago, this Court declared that it alone bears the responsibility of determining "what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). This is particularly so where, as here, the Supreme Court interprets the ambit of protections afforded by the Bill of Rights. United States v. Lopez, ___ U.S. ___, ___, 115 S.Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); Miller v. Johnson, ___ U.S. ___, ___, 115 S.Ct. 2475, 2491 (1995). In enacting RFRA, Congress has intruded into this Court's sphere of power.

In 1990, this Court handed down its decision in Employment Division v. Smith, 494 U.S. 872 (1990), which delineated the protection afforded by the Free Exercise Clause of the First Amendment. Prior to Smith, there were at least two analytical approaches to free exercise jurisprudence. Under the decisions in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963), free exercise analysis required courts to apply strict scrutiny. Under Bowen v. Roy, 476 U.S. 693 (1986) and Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988) this Court applied a more relaxed standard to free exercise claims where the claimant challenges internal government operations. See e.g. Lyng, 485 U.S. at 450-51. In Smith, this Court reviewed the various analyses from the case law and clarified the appropriate standard of scrutiny in free exercise claims. Smith teaches that government need not accommodate religious practices where the challenged government action is facially neutral and generally applicable. Smith, 494 U.S. at 885.

Congress enacted RFRA for the express purpose of overruling this Court's decision in Smith. See, e.g., 42 U.S.C. 2000bb(a)(4) (Smith "virtually eliminated the requirement that the government justify burdens on religious exercise"), and 2000bb(b)(1) (the purposes of RFRA are to "restore the compelling interest test"). The legislative history evidences the same fact; RFRA attacks this Court's holding in Smith. See, generally, The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcom. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2 (1990).

The broad scope of RFRA illustrates why Congress is the wrong body to enforce the Free Exercise Clause. Congress boldly engrafted onto every piece of federal and state legislation a strict scrutiny analysis that applies whenever the legislation impinges on one's right to freely practice his or her religion. This sweeping approach does not allow the delicate balancing act required in harmonizing the conflicts inherent in the Free Exercise and Establishment Clauses. Only the courts can perform that balancing act.

Congress has run afoul of Marbury and Lopez. It has unconstitutionally taken for itself the role of defining the substance of those rights established by the First Amendment. It has exceeded its authority by treading on this Court's domain. RFRA is an unconstitutional usurpation of judicial power.

CONCLUSION

For the foregoing reasons, the MCLU asks this Court to grant a Writ of Certiorari or, in the alternative, to hold this case for resolution pending the Court's decision in Flores.

Dated: October 22, 1996

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In The

Supreme Court of the United States

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IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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U.S. Const. Amend. I (Establishment Clause).....1-2, 3, 4, 5

Statutes:

Religious Freedom Restoration Act ("RFRA"), generally..... 1, 3

REASONS FOR GRANTING THE WRIT

I. HAVING RECENTLY GRANTED CERTIORARI IN *CITY OF BOERNE V. FLORES* TO CONSIDER THE CONSTITUTIONALITY OF RFRA, THIS COURT SHOULD ALSO GRANT CERTIORARI IN THIS CASE TO COMPLETE THE CONTEXT OF ITS CONSTITUTIONAL SCRUTINY OF RFRA.

This Court recently granted certiorari in *City of Boerne v. Flores* (No. 95-2074) to consider the constitutionality of RFRA in light of the principle of Separation of Powers and the principle of federalism. *Flores* involves the invalidation of a local ordinance pursuant to RFRA.

Like *Flores*, the present case also involves the issue of RFRA's constitutionality under the principle of Separation of Powers. There is obviously overlap between *Flores* and the present case.

Because the present case involves federal law, however, the focus of the Separation of Powers issue here would be RFRA's constitutionality as applied to federal law. RFRA's defenders[1] assert that the Separation of Powers issue in the context of a federal statute is "quite distinct" from the Separation of Powers issue presented in *Flores*. Brief in Opposition to Petition for Writ of Certiorari at 8-9. Given the fact that RFRA's defenders apparently wish to reserve the argument that RFRA's constitutionality may depend upon whether state or federal law is involved, this Court cannot fully address the issue of Congress' constitutional power to enact RFRA without granting certiorari in a case, like the present case, that involves federal law rather than state or local law. Accordingly, the present case enables this Court to address the full issue of whether RFRA violates the principle of Separation of Powers.

The present case also provides an excellent set of facts by which to evaluate RFRA's validity under the Establishment Clause. The

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[1]The same attorney is counsel of record both for the Church in the present case and for the church in the *Flores* case.

present case clearly illustrates, for all to see, that RFRA compels some people involuntarily to subsidize other persons' religious beliefs, in violation of the most fundamental and long-standing constitutional principles.

II. IF THIS COURT DOES NOT GRANT CERTIORARI IN THE PRESENT CASE, IT SHOULD HOLD THE PRESENT CASE PENDING DECISION OF *FLORES*.

In the event that this Court decides not to grant certiorari in the present case, the Court should hold the case pending the decision of *City of Boerne v. Flores*, because of the overlap between this case and *Flores*.

III. THE CONSTITUTIONAL ISSUES WERE PRESENTED TO THE COURT OF APPEALS.

Respondent Church asserts that "one simple fact is dispositive fact in this Court: *petitioner never presented to any court below the constitutional questions allegedly presented in the petition.*" Opp. at 1 (emphasis in original).[2] Respondent Church could not be more wrong. The constitutional questions were repeatedly presented to the court below.

The appeal to the Eighth Circuit was fully briefed by both sides prior to the enactment of RFRA.[3] Following RFRA's enactment, at the request of the Church, the court of appeals ordered the parties, on only two weeks' notice, to brief the "application of

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[2]The Brief in Opposition to Petition for Writ of Certiorari is cited as Opp. The Petition for Writ of Certiorari, and the Appendices thereto, are cited as Pet. Page numbers beginning with A are part of the Appendices.

[3]The Church states that the constitutionality of RFRA was not briefed in "the original briefs" before the Court of Appeals. Brief in Opposition to Petition for Writ of Certiorari at 6. The Church omits to inform this Court, however, that the original briefs were filed well before RFRA was even enacted. It is absurd to assert that the Trustee should have addressed the constitutionality of a non-existing statute.

RFRA" to the case. The briefs were limited to ten pages. *See* Order dated November 24, 1993. The Trustee's ten-page brief covered, among other things, the issues of: (1) the propriety of the court of appeals' consideration of RFRA; (2) RFRA's retroactivity; (3) whether the Debtors were "substantially burdened" by recovery of their gift to the Church; and, (4) whether the Bankruptcy Code serves a "compelling governmental interest." **In addition, contrary to the Church's statement, the Trustee also argued in the ten-page brief that if the Church were to prevail by means of RFRA, the Eighth Circuit would unconstitutionally be endorsing certain religious practices.** Obviously, given the severe constraints of time and space imposed by the court of appeals, and the large number of issues covered by the brief, the Trustee could not have exhaustively briefed any issue relating to RFRA. Nevertheless, here is what the Trustee wrote concerning the constitutionality of RFRA, in the first instance in which the Trustee could possibly have addressed RFRA:

> The Restoration Act [i.e., RFRA], however, specifically provides that it is not to "be construed to affect, interpret, or in any way address" the Establishment Clause of the First Amendment. Restoration Act at § 7. Accordingly, the Restoration Act is simply not applicable to Appellee's [sic; the Trustee must have meant "Appellant's"] newly-asserted constitutional claim. ...
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> If Appellant were permitted to assert a claim that its free exercise rights were infringed upon by the implementation of the Bankruptcy Code, the Court, in effect would be endorsing religions that value tithing over those that do not prioritize tithing or those that value community service over tithing. Thus, the Court would be unnecessarily interfering with the free exercise of religion [sic; the Trustee's argument was properly grounded in the concerns of the Establishment Clause, not the Free Exercise Clause] guaranteed under the First Amendment.

Appellee's Supplemental Brief dated December 8, 1993, at 6 n.4,

7-8 n.6. The Church is simply wrong, therefore, to assert to this Court, Opp. at 6, that the Trustee's brief concerning RFRA did not raise the constitutional argument.[4]

At oral argument, the Trustee again expressly and repeatedly argued that if RFRA meant that the Trustee could not recover the Debtors' pre-bankruptcy transfers to the Church, RFRA would violate the Establishment Clause. *See* quotations from oral argument in Pet. at 26. The Trustee did not make only conclusory statements about the Establishment Clause and then rest, as the Church suggests. See Opp. at 6. Rather, as the audiotape of oral argument demonstrates, the Trustee repeatedly developed the argument that if RFRA prohibited the Trustee's recovery of the pre-bankruptcy gifts to the Church, the creditors whom the Trustee represents would be forced to sacrifice their rights in order to support the Debtors' Church. For example, the Trustee argued:

> This latent property right of bankruptcy trustees to recover the gifts of insolvent debtors exists of course in favor of the debtors' creditors -- after all, the trustees are trustees for the creditors. The property rights of the trustee, therefore, are for the benefit of the debtors' creditors so that the creditors can recover at least some portion of the debts justly owed to them by their debtors. If the creditors were required to forego their right to partial repayment of their debts because their debtors had given their property to a church, as opposed to some secular institution like the Red Cross, very clearly the creditors would be giving up their rights in order to support the debtors' religious preferences.

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[4]The Church also asserts that the Trustee should have discussed the constitutionality of RFRA in "briefs addressed to the intervention of the United States." Opp. at 6. The United States, however, intervened on behalf of the Trustee, arguing in its brief that RFRA should not be interpreted to prohibit the Trustee's recovery of the Debtors' pre-bankruptcy transfers to the Church. The Trustee, therefore, had no reason to submit a brief concerning the United States' intervention.

The Trustee further pressed the constitutional arguments in her post-hearing submissions in response to the Church's post-hearing written arguments.

The Establishment Clause implications of the Church's position were also addressed by the bankruptcy court and the district court, both of which held that to inquire into the value of the Debtors' religious beliefs, as the Church requested, would result in the sort of entanglement that the Constitution forbids.[5] *See* Pet. at A73, A93.

The Church also asserts that the court of appeals "held" that the Trustee had "waived" the constitutional challenges to RFRA. The Church is wrong. The court of appeals merely stated, incorrectly, "The parties did not raise the constitutionality of RFRA, and we do not consider the constitutionality of RFRA." Pet. A22. There was never any "holding" of "waiver." There was no analysis of any issue of waiver. The court of appeals never even mentioned waiver.[6]

In any event, either the court of appeals made a mistake in failing to recollect the arguments the Trustee had made more than nineteen months earlier, when the case was briefed and argued, or, if the Church is correct, the court of appeals consciously decided to rule that the constitutional arguments were not before it. Either way, the court of appeals was wrong not to consider the constitutional arguments that the Trustee presented in her original brief concerning RFRA, in her oral argument, and in responses to the Church's post-hearing written argument.

The Church's "waiver" argument boils down to the idea that this

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[5]This point rebuts the Church's incorrect argument that "[t]he Trustee's Question 2, whether RFRA violates the entanglement prong of this Court's Establishment Clause doctrine, was never presented below." Opp. at 6.

[6]The Church also argues that because the Trustee mistakenly failed to have the constitutional challenge certified to the Attorney General, the Trustee could not have been raising constitutional challenges. Opp. at 8. But the court of appeals' decision itself in this case disposes of the Church's argument: "[f]ailure to notify the Attorney General is not a jurisdictional defect, and belated notice satisfies any requirement. Certification has occurred even after judgment at the appellate level." Pet. at A10 (citations omitted).

Court should not care if an appellee has been deprived of constitutional rights when a court of appeals incorrectly recollects, or incorrectly decides, that the constitutional arguments were not made. It is the essence of this Court's function, however, to care about the deprivation of constitutional rights. The Trustee made the constitutional arguments. Procedural due process requires that those arguments be considered. Enforcement of constitutional rights cannot become a matter of the discretion of the appellate courts.

CONCLUSION

The Trustee requests that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit or, at least, hold the case pending the decision of *City of Boerne v. Flores* (No. 95-2074). In the alternative, the Trustee requests that this Court, in the exercise of its supervisory powers, remand the case to the court of appeals to address the parties' constitutional arguments.

Respectfully submitted,

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